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Supreme Court, U. S.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES POSTAL SERVICE, PETITIONER

v.

ASSOCIATED THIRD CLASS MAIL USERS

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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I N D E X

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Reasons for granting the petition	10
Conclusion	18
Appendix A	1A
Appendix B	77A
Appendix C	79A
Appendix D	81A
Appendix E	100A
Appendix F	104A
Appendix G	106A
Appendix H	110A

CITATIONS

Cases:

<i>American Farm Lines v. Black Ball Freight Service</i> , 397 U.S. 532	14
<i>Concerned Residents of Buck Hill Falls v. Grant</i> , 537 F. 2d 29	15
<i>DeFunis v. Odegaard</i> , 416 U.S. 312	12
<i>Immigration and Naturalization Service v. Stansic</i> , 395 U.S. 62	18
<i>Independent Meat Packers Ass'n. v. Butz</i> , 526 F. 2d 228, certiorari denied, 424 U.S. 966	15
<i>McCullough v. Redevelopment Authority of Wilkes-Barre</i> , 522 F. 2d 858	15
<i>Morton v. Ruiz</i> , 419 U.S. 195	18

Cases—Continued

	Page
<i>North Carolina v. Rice</i> , 404 U.S. 244-----	12
<i>Roe v. Wade</i> , 410 U.S. 113-----	14
<i>Securities and Exchange Commission v. Medical Committee for Human Rights</i> , 404 U.S. 403-----	12
<i>Udall v. Tallman</i> , 380 U.S. 1-----	18
<i>United States v. Lockyer</i> , 448 F. 2d 417---	15
<i>United States v. Munsingwear, Inc.</i> , 340 U.S. 36-----	10
<i>United States v. Wilbur</i> , 427 F. 2d 947, certiorari denied, 400 U.S. 945-----	15
<i>United States v. W. T. Grant</i> , 345 U.S. 629-----	9, 12
<i>Weinstein v. Bradford</i> , 423 U.S. 147-----	12
Statutes and regulations:	
Postal Reorganization Act, 39 U.S.C. 101, <i>et seq.</i> -----	2
39 U.S.C. (1970 ed.) 2641(a)-----	3
39 U.S.C. 3622(a)-----	3
39 U.S.C. 3622(b)-----	3
39 U.S.C. 3624-----	3
39 U.S.C. 3625-----	6
39 U.S.C. 3625(b)-----	3
39 U.S.C. 3625(c)-----	3
39 U.S.C. 3625(d)-----	3
39 U.S.C. (1970 ed.) 3641(a)-----	3, 13
39 U.S.C. 3641(b)-----	4
39 U.S.C. 3641(c)-----	4
39 U.S.C. 3681-----	10

Statutes and regulations—Continued

	Page
Public Law 94-421, 90 Stat. 1306:	
Section 5(a)-----	4
Section 6(a)-----	4, 13
40 Fed. Reg. 47589-----	5
41 Fed. Reg. 11221-----	7
41 Fed. Reg. 29570-----	7
42 Fed. Reg. 12858, 12860-----	9

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

The Solicitor General, on behalf of the United States Postal Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A-76A) is not yet reported. The opinion of the district court (App. D, *infra*, pp. 81A-99A) is reported at 405 F. Supp. 1109.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 77A-78A) was entered on December 28, 1976.

The Postal Service's timely petition for rehearing and suggestion for rehearing en banc were denied on April 21, 1977 (Apps. C and H, *infra.*). On July 12, 1977, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a suit to enjoin implementation of a temporary mail rate became moot when the challenged rate was superseded.

2. Whether the alleged failure of the Governors of the United States Postal Service to follow their unpublished, internal operating procedures in directing the Postal Service to submit a request for a rate change to the United States Postal Rate Commission renders invalid a temporary rate based upon that request.

3. Whether the Governors of the Postal Service were mistaken in believing that they had followed their own procedures.

STATEMENT

This case involves the validity of temporary postal rates in effect from December 1975 to March 1976.

The ratemaking procedures under the Postal Reorganization Act, 39 U.S.C. 101 *et seq.*, may be briefly summarized as follows. In order to effect a permanent change in rates, the Postal Service must submit a

request for the change to the Postal Rate Commission. 39 U.S.C. 3622(a). The Commission then must conduct a public hearing and, at its conclusion, transmit a recommended decision to the Governors of the Postal Service. 39 U.S.C. 3624.¹ The Governors then have three options: they may approve the recommended decision and order it placed in effect (39 U.S.C. 3625(b)), or "may, under protest, allow a recommended decision of the Commission to take effect and (1) seek judicial review thereof * * * or (2) return the recommended decision to the Commission for reconsideration and a further recommended decision * * * " (39 U.S.C. 3625(c)), or "may reject the recommended decision of the Commission and the Postal Service may resubmit its request to the Commission for reconsideration * * * ." 39 U.S.C. 3625(d).

The statute also provides a mechanism for implementing temporary increases in rates during the pendency of proceedings for permanently changing rates. At the times relevant to this case, the statute provided (39 U.S.C. (1970 ed.) 3641(a)):

If the Postal Rate Commission does not transmit to the Governors [of the Postal Service] within 90 days after the Postal Service has submitted * * * to the Commission a request for a recommended decision on a change in rates * * *, the Postal Service, upon 10 days notice in the Federal Register, may place into effect tempo-

¹ The Commission is required to make its recommended decision on the basis of the factors set forth in 39 U.S.C. 3622(b).

rary changes in rates * * * it considers appropriate to carry out the provisions of this title.²

In September 1973, the Service submitted a request to the Commission for a permanent change in rates for all classes of mail, which schedule of rates may be most conveniently referred to, according to the requested first class rate, as the "10 cent rate." On August 28, 1975, after two years of proceedings, the Commission transmitted to the Governors a recommended decision setting forth at great length the basis for the rate changes recommended therein. On September 4, 1975, the Governors ordered the decision placed into effect as of September 14, 1975 (see App. E, *infra*, p. 101A).

On the same day, the Governors considered a proposal from the Service's management to submit a new request for permanent changes to the Commission, hereafter referred to as the "13 cent rate." The Board was informed that without new rates "the

² The statute also authorized the implementation of temporary rates when a court reviewing the validity of permanent rates "orders a matter returned to the Commission for further consideration * * *." 39 U.S.C. (b). Section 3641(c) also placed a ceiling on the temporary rates that could be implemented, by providing that a temporary change in rates "may not exceed the lesser of (1) the rate or fee requested for such class or service, or (2) a rate or fee which is more than one-third greater than the permanent rate or fee in effect for that class or service at the time a permanent change in the rate * * * is requested * * *." The statute was amended in 1976 to eliminate the second of these limitations and to permit the Service to implement temporary rates not sooner than 10 months after its submission of a request for a permanent change in rates to the Rate Commission. Sections 5(a), 6(a) of Pub. L. 94-421, 90 Stat. 1306 (App. G, *infra*, pp 106A-109A).

deficit for fiscal year 1976 was estimated to exceed \$2.5 billion," that the preparation of the submission had been going on for some months, and "that the process was still incomplete in view of the very recent receipt of the Commission's [10 cent rate] opinion, but that the general outline of what postal management considered to be appropriate adjustments to the various postal rates was now reasonably clear" (App. E, *infra* pp, 102A-103A). The minutes of the meeting further reflected that "[t]he Board then reviewed the general magnitude of the increases in revenue which management deemed necessary and appropriate for each of the principal categories of mail and concluded that the Postal Service should complete the process of refining its proposed filing with the Rate Commission and should endeavor to file its request with the Commission by not later than September 19" (*id.* at 103A.). Accordingly, on September 18, 1975, the Service filed its request with the Commission for a permanent change in rates.

On October 9, 1975, the Service published notice in the Federal Register that it would institute a temporary 13 cent rate as of December 28, 1975, unless the Commission transmitted its recommended decision on the permanent 13 cent rate request to the Governors within ninety days after submission of the request to the Commission (40 Fed. Reg. 47589).

On October 31, 1975, respondent brought suit in the United States District Court for the District of

Columbia, seeking declaratory relief and an injunction prohibiting the Service from placing temporary rates into effect incident to the September 18 submission. Respondent claimed that the September 18 submission violated the Board's internal operating procedures because the Board of Governors on September 4 had not reviewed in detail the specific rates and fees, or the information supporting them, requested in the September 18 submission. Those operating procedures, which were not published as formal regulations, provided at the time (App. D, *infra*, pp. 86A-87A):

The following matters are reserved for decision by the Board of Governors.

* * * * *

8. Requests to the Postal Rate Commission for recommended decisions on postal rates and mail classifications, and action upon such recommended decisions (by the Governors, 39 U.S.C. § 3625).

On November 7, the Board of Governors, at a regularly scheduled meeting, adopted a resolution that its September 4 action was consistent with its operating procedures (App. A, *infra*, p. 47A). Nevertheless, on December 16, 1975, the district court entered judgment for respondent on the ground that the Board had not followed the statutory procedures, as implemented in its own operating procedures, in authorizing the submission to the Commission (App. D, *infra*, pp. 81A-99A). The court enjoined the Service from putting the temporary rates into effect until it had reviewed the submission in accordance

with the procedures the court thought to be required (App. D, *infra*, p. 99A).³

On December 19, the Board convened a special meeting, reviewed the "specific rates and fees to be requested" and the "full supporting data and documentation", and directed the Service to submit the September 18, 1975, request again to the Commission. The Service did so on the same day (App. A, *infra*, p. 48A).

On December 29, 1975, the court of appeals stayed the injunction pending appeal, and the Service, on December 31, 1975, placed the temporary 13 cent rate into effect (*ibid.*). On March 17, 1976, the Service published notice in the Federal Register that it would place temporary rates into effect incident to the December 19, 1975, submission. (41 Fed. Reg. 11221). On July 7, 1976 the Governors approved the Rate Commission's decision recommending the permanent 13 cent rate, and that rate went into effect on July 18, 1976 superseding the temporary rate then in effect (41 Fed. Reg. 29570) (App. A, *infra*, pp. 10A-11A, n. 21).⁴

The court of appeals consolidated the Service's appeal from the district court's judgment with a petition to review the validity of the permanent 10 cent

³ The National Easter Seal Society for Crippled Children and Adults intervened in respondent's suit as plaintiff, challenging the Service's implementation of fees for special services. The courts below upheld the Society's challenge (App. A, *infra*, pp. 47A, n. 102, 50A-56A) and we do not seek review of that ruling.

⁴ The validity of the permanent 13 cent rate currently is being reviewed by the court below. *National Association of Greeting Card Publishers v. United States Postal Service*, No. 76-1611.

rate, filed by the National Association of Greeting Card Publishers and others (App. A, *infra*, p. 4A).⁵

On December 28, 1976, the court of appeals issued a decision in the consolidated cases, ruling that the permanent 10 cent rate had been invalid and that the district court had been correct in enjoining the temporary 13 cent rate on procedural grounds (App. A, *infra*).

With respect to the permanent 10 cent rate, the court of appeals concluded that the Postal Rate Commission, in establishing recommended rates for each of the more than 20 classes and subclasses of mail, had employed a costing methodology giving too much weight to certain of the factors set forth in the statute and too little weight to other factors (App. A, *infra*, pp. 9A-45A).⁶

With respect to the temporary 13 cent rate case, the court of appeals agreed with the district court that the Board of Governors' internal operating pro-

⁵ The court also consolidated an appeal by the State of Maine from the district court's refusal to enjoin the temporary 13 cent rate on the ground that the permanent rate request to which it was incident was invalid. The court affirmed the denial of relief to Maine (App. A, *infra*, pp. 65A-68A).

⁶ The court also concluded that, while the implementation of the permanent 13 cent rate in July 1976 (pending review of the 10 cent rate) "may preclude this Court from presently providing an effective remedy for any injury incurred", the case was not moot because the eleven-month period between the promulgation of the 10 cent rate and the 13 cent rate made such rate cases subject to the "capable of repetition yet evading review" exception to the mootness doctrine (App. A *infra*, pp. 10A-12A, n. 21).

cedures required the Board to review the "specific changes [in rates] proposed by management and the supporting data" before authorizing a rate submission to the Commission (App. A, *infra*, p. 59A). Acknowledging the Board's own resolution of November 7 to the effect that its September 4 authorization complied with its procedures, the court nevertheless indicated that "[w]here the words in question, as here, do not require any special competence for their interpretation, a court may well be equally or better qualified to interpret them than is the agency * * *" (App. A, *infra*, p. 61A). The court therefore held that the temporary rates in effect from December 31, 1975, to March 17, 1976, had not been validly promulgated. The court also concluded that, even though the injunction had lapsed upon the Service's repromulgation of temporary rates pending appeal, the matter was "capable of repetition yet evading review" and that the "voluntary cessation of allegedly illegal conduct * * * does not make the case moot" (quoting from *United States v. W. T. Grant Co.*, 345 U.S. 629, 632) (App. A, *infra*, p. 493A, n. 107).⁷

⁷ In March 1977, the Board of Governors amended the provisions of its internal operating procedures relied on by the court of appeals. The amended provision no longer describes the matter reserved for the Board's decision in terms of "requests to the Postal Rate Commission for recommended decisions on postal rates * * *"; instead, the Board is described as having responsibility for "authorization of the Postal Service to request the Postal Rate Commission to submit a recommended decision on changes in postal rates * * *" (42 Fed. Reg. 12858, 12860).

REASONS FOR GRANTING THE WRIT

1. Respondent's claim for declaratory and injunctive relief against the promulgation of the temporary 13 cent rate was moot when the court of appeals issued its decision. While mootness deprives this particular controversy of any substantial or continuing importance, the decision below, holding invalid postal rates that had been in effect for more than three months, may have significant collateral legal consequences. It is our understanding that certain mailers may file suit seeking refunds or other relief with respect to these rates. The Postal Service has estimated that the temporary rates held invalid by the court of appeals generated more than \$500 million more revenues than would have been generated by the rates previously in effect. While the Postal Service would present other defenses to such a suit,^{*} the decision below, if permitted to stand, may draw into question the Service's ability to defend on the merits. See *United States v. Munsingwear, Inc.*, 340 U.S. 36.^{**} In these circumstances, this Court should exercise its "supervisory power over the judgments of the lower federal courts * * * to prevent a judgment, unreviewable because of mootness, from spawning any

^{*} For example, it may be argued that there is no legal basis for refunds where the promulgation of otherwise lawful rates was merely procedurally defective, and that such a claim would be barred by sovereign immunity if not by statute. See 39 U.S.C. 3681.

^{**} The problem of collateral legal consequences does not arise with respect to the 10 cent rate, for the statute explicitly bars reimbursement of amounts paid under permanent rate schedules. 39 U.S.C. 3681. For that reason we do not seek review in that case.

legal consequences." *United States v. Munsingwear, Inc.*, *supra*, 340 U.S. at 40-41.^{*}

By the time the court of appeals issued its decision in December 1976, the temporary rates challenged by respondent's suit had long been superseded. First, in March 1976, a temporary 13 cent rate promulgated pursuant to procedures that were proper according to the court's own rationale had gone into effect and the district court's injunction had lapsed by its own terms. Second, in July 1976 the temporary 13 cent rate was superseded altogether by the implementation of the permanent 13 cent rate. Furthermore, in September 1976 the basic statutory mechanism for the promulgation of temporary rates had been materially changed. In particular, the Service must now wait ten months (as opposed to the previous three months) after a rate change request has been submitted to the Commission before it can put temporary rates into effect.^{**} Accordingly, by December 1976 the likelihood of a similar controversy arising again had become remote.

^{*} We recognize that the fact of mootness would ordinarily militate against this Court's plenary review of this case, even if the Court agreed with our contention (pp. 14-17, *infra*) that the court below erred with respect to the merits. Since there may be significant collateral legal consequences to the court of appeals' decision, however, that decision should not be allowed to stand unreviewed. In these circumstances, the Court may conclude that the lower court's holding on the issue of mootness is sufficiently contrary to this Court's recent decisions to warrant summary reversal.

^{**} Moreover, the statute now requires the Commission to complete its proceeding within the same period (App. G, *infra*, p. 106A).

The adjudication by the court of appeals therefore contravened the well-established principle that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246. See also *DeFunis v. Odegaard*, 416 U.S. 312, 316. Indeed, in view of the change in the underlying statute, it cannot even be said that there was any public interest in the resolution of the issues involved. Cf. *DeFunis v. Odegaard*, *supra*, 416 U.S. at 316.

This case does not fall within the "voluntary cessation of illegal activity" exception to the doctrine of mootness. That exception rests primarily on the notion that a person should not be able to defeat judicial review of his wrongful acts by temporarily ceasing them; its purpose is to ensure that the defendant is not merely left "free to return to his old ways." *United States v. W. T. Grant Co.*, *supra*, 345 U.S. at 632. Accordingly, that exception does not apply where "there is no reasonable expectation that the wrong will be repeated." *United States v. W. T. Grant Co.*, *supra*, 345 U.S. at 633. See also *DeFunis v. Odegaard*, *supra* 416 U.S. at 318; *Weinstein v. Bradford*, 423 U.S. 147; *Securities and Exchange Commission v. Medical Committee for Human Rights*, 404 U.S. 403, 406. There was, and is, no such expectation here. In view of the facts that a federal district court had concluded that the submission of the rate request had been procedurally defective and that compliance with that court's view of the proper procedures, although perhaps more cumbersome, was by no means impractica-

ble,¹⁰ there was virtually no likelihood that the Governors would risk the adverse financial consequences that adherence to their former practice might entail.¹¹ See *Securities and Exchange Commission v. Medical Committee for Human Rights*, *supra*, 404 U.S. at 406.

Similarly, the case does not fall within the "capable of repetition yet evading review" exception to the doctrine of mootness. As indicated above, the controversy is not in any meaningful sense capable of repetition. Furthermore, temporary rate orders do not "evade review." Under the statute prior to its 1976 amendment, temporary rates could remain in effect up to 30 days after the Rate Commission transmitted its recommended decision to the Governors for approved—in this case up to 30 days after June 30, 1976. 39 U.S.C. (1970 ed.) 3641(a). Under the statute as amended, temporary rates can remain in effect up to 150 days after the Commission transmits its recommended decision. Section 6(a) of Pub. L. 94-421, 90 Stat. 1306-1307 (App. G, *infra*, p. 108A). In this case the district court entered its order on December 16, 1975, and notice of appeal was filed on December 17,

¹⁰ In this case, for example, the Governors would have complied with the court's view of proper procedures if, instead of authorizing the submission on September 4 on the basis of their review of the general outlines of a request that required further refinement, they had waited until September 18 to review the completed request and authorized its submission on that day.

¹¹ Absent a stay, the district court's injunction, preventing placing temporary rates into effect until a new rate request had been made and the 90-day waiting period had expired, would have added more than \$500 million to the Postal Service's deficit.

1975. The court of appeals heard and granted a motion for stay of the injunction on December 29, 1975. The merits of the case were briefed in January 1976 and the court heard argument in February. There was and is, therefore, ample time for review of temporary rate orders.

Since the case became moot before it was decided by the court of appeals, the judgment below should be reversed and the case remanded to the district court with instructions to dismiss the complaint.

Alternatively, the judgment below should be vacated on the ground that the case became moot no later than March 1977, when the Board's operating procedures were amended (see p. 9; n. 7, *supra*). *United States v. Munsingwear, Inc.*, *supra*. See also *Roe v. Wade*, 410 U.S. 113, 125. That amendment removes any reasonable possibility that the alleged wrong, failure to follow the superseded procedures, will be repeated: those procedures have been amended to make clear that the Board has reserved to itself only the decision to authorize the Service to submit rate requests and not, as the courts below believed to be true under the prior operating procedures, the decision on the detailed rate proposals accompanying the requests. The alleged wrong cannot now be repeated, except in the unlikely event the Board reenacts its prior procedures.

2. The court of appeals' holding that a violation of an agency's internal operating procedures renders a rate decision invalid is inconsistent in principle with this Court's decision in *American Farm Lines v.*

Black Ball Freight Service, 397 U.S. 532. In that case, the Interstate Commerce Commission had granted a temporary certificate authorizing service to a motor carrier, even though the information submitted by the carrier in support of its application was inadequate under the Commission's regulations, which had been promulgated pursuant to statutory standards governing the grant of temporary authority. This Court sustained the issuance of the certificate against the challenge of competing carriers, holding that an agency "is entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary to resolve quickly and correctly urgent * * * problems" and that an agency's modification of procedural rules adopted for the orderly transaction of business is not judicially reviewable absent a strong showing of prejudice to the complaining party (397 U.S. at 538-539). See also *Concerned Residents of Buck Hill Falls v. Grant*, 537 F. 2d 29 (C.A. 3); *Independent Meat Packers Assn. v. Butz*, 526 F. 2d 228, 236 (C.A. 8), certiorari denied, 424 U.S. 966; *McCullough v. Redevelopment Authority of Wilkes-Barre*, 522 F. 2d 858 (C.A. 3); *United States v. Lockyer*, 448 F. 2d 417 (C.A. 10); *United States v. Wilbur*, 427 F. 2d 947 (C.A. 9), certiorari denied, 400 U.S. 945.

Accordingly, even if, contrary to our submission (see pp. 16-17, *infra*), the Governors did not follow their internal operating procedures, the rate determination was valid. Indeed, although the court of appeals referred to them as "regulations" (App. A,

infra, pp. 56A, 61A), the operating procedures were simply internal, unpublished directives to Postal Service management that conferred neither procedural nor substantive rights on respondent.¹² Moreover, the violation, if any, of these directives was merely technical: the Board on September 4, 1975, was faced with the critical necessity of authorizing the submission of a new rate request as soon as possible in order to avoid a substantial deficit, and while the precise contours of the proposed submission had not been completely refined, the Governors were aware of its general outlines and had approved the underlying methodology. Finally, respondent has not shown the slightest prejudice from the Board's failure to meet again to review all the detailed information and proposed rates and fees before they were formally submitted to the Rate Commission. In these circum-

¹² As in *American Farm Lines, Inc.* the underlying purpose of the procedures was, as the court below noted (App. A, *infra*, pp. 58A-59A), "to assure the Board the data necessary for decision." The introduction to those procedures stated (Court of Appeals Appendix 90):

"The procedures set forth herein represent the framework of the system through which the Board of Governors monitors the exercise of the authority it has delegated, measures progress toward the goals it has set, and shapes the policies by which the future development of the Postal Service will be guided.

"The procedures are intended to insure that significant information on developments meriting attention by the Board is brought before the Board in a timely manner, as well as insuring that the Board obtains the data it needs as a predicate for final determination of the level of costs to be incurred by the Postal Service, for action on recommendations by the Postal Rate Commission, and for other decisions to be made by the Board."

stances it was improper to enjoin the implementation of temporary rates incident to that filing.

3. The court of appeals erred in holding that the Governors' action on September 4, 1975, violated the operating procedures. A procedure that reserves to the Board of Governors decisions concerning "requests to the Postal Rate Commission for recommended decisions on postal rates" does not by its terms preclude the Board from authorizing the Service to submit a request whose final details have not yet been worked out; nor does it require the Board to have before it every footnote before it can act on matters of importance requiring quick action.¹³

Furthermore, the Governors on November 7, 1975, expressly stated that their September 4 action was consistent with their procedures, and the court of appeals' failure to give any weight to that conclusion contravenes elementary principles of administrative law. For a reviewing court to ignore an agency's interpretation of its own operating procedures whenever the court, in its own view, is "equally or better qualified to interpret [the words in question] than is the agency" (App. A, *infra* p. 61A) flies in the face

¹³ Indeed, the ratemaking procedures set forth in the statute make such detailed review unnecessary. The submission of a rate request is only the first step in a complex proceeding. The Rate Commission still must conduct a hearing and submit a recommended decision to the Governors that may modify considerably the initial request. Permanent rates go into effect only at the conclusion of that proceeding, after the Governors have considered and approved the recommended decision of the Rate Commission. See pp. 3-4, *supra*.

of the basic precept that an agency's interpretation of its own rules and regulations is entitled to great weight. See, *e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16-17; *Immigration and Naturalization Service v. Stanisic*, 395 U.S. 62, 72.¹⁴

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, Jr.,
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AUGUST 1977.

¹⁴ The court's reliance on *Morton v. Ruiz*, 415 U.S. 199, is unfounded. That case involved a purported administrative interpretation of legislation, an interpretation, furthermore, that was at odds not only with the legislative history but also with the agency's prior pronouncements on the subject.

APPENDIX A

[Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.]

United States Court of Appeals for the District of
Columbia Circuit

No. 75-1856

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
APPELLANT

v.

THE UNITED STATES POSTAL SERVICE, APPELLEE
UNITED PARCEL SERVICE OF AMERICA, INC.,
AMERICAN BUSINESS PRESS, INC., ET AL., ASSOCIATED
THIRD CLASS MAIL USERS, INTERVENORS

*Notice of Appeal from an Order of the U.S. Postal
Service*

(1A)

No. 75-1857

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT
UNITED PARCEL SERVICE OF AMERICA, INC.,
AMERICAN BUSINESS PRESS, INC., ET AL.
ASSOCIATION OF AMERICAN PUBLISHERS, INC.
PARCEL POST ASSOCIATION, INTERVENORS

*Petition for Review of an Order of the U.S. Postal
Service*

No. 75-2227 & 75-2228

ASSOCIATED THIRD CLASS MAIL USERS
NATIONAL EASTER SEAL SOCIETY FOR CRIPPLED
CHILDREN AND ADULTS

v.

UNITED STATES POSTAL SERVICE, APPELLANT
POSTAL RATE COMMISSION, ET AL.

(D.C. Civil Action 75-1809)

No. 75-2238

STATE OF MAINE, ET AL., APPELLANT

v.

UNITED STATES POSTAL SERVICE, APPELLEE

(Civil Action 75-1782)

Appeals from the United States District Court for the
District of Columbia

Argued February 20, 1976—Decided December 28,
1976

TABLE OF CONTENTS

	Page
Introduction	4A
I. Background	5A
A. Legislative requirements	5A
B. Prior ratemaking proceedings	8A
II. Nos. 75-1856, 75-1857: The NAGCP case	9A
A. 39 U.S.C. § 3601	11A
B. 39 U.S.C. § 3622	15A
1. Commission's approach to section 3622 (b) (3) and ALJ's alternative approach	17A
a. Attribution	17A
b. Assignment	19A
c. Alternative approaches	21A
2. Requirements of section 3622	25A
a. Interpreting subsection 3622(b) (3)	27A
b. Compliance with the Act	37A
(1) Attribution	38A
(2) Assignment	43A
III. Nos. 75-2227, 75-2228 and No. 75-2238: The ATCMU and the State of Maine cases	45A
A. The ATCMU case	49A
1. Proposed changes in fees for special services	50A
2. Request for changes in postal rates and fees	56A
B. The State of Maine case	65A

(3A)

I. BACKGROUND

PER CURIAM: These three cases, consolidated for consideration on the merits, raise a full range of substantive and procedural challenges to a series of orders of the United States Postal Service ("Postal Service" or "USPS") issued pursuant to the Postal Reorganization Act of 1970 ("Act"), 39 U.S.C. § 101 *et seq.*, for the purpose of implementing certain increases in postal rates and fees, either temporarily or on a permanent basis.¹ In Nos. 75-1856, 75-1857—the National Association of Greeting Card Publishers ("NAGCP") case—we review the permanent rates that were in effect from September to December, 1975. In Nos. 75-2227, 75-2228 and No. 75-2238—the Associated Third Class Mail Users ("ATCMU") and State of Maine cases, respectively—we review the temporary rates that were in effect from December, 1975 to July 18, 1976. Viewed together these cases prompt us not only to decide the individual merits of each claim but also to consider the Postal Service's overall progress to date in adapting to the Act's special, and quite demanding, ratemaking requirements. We bring to this task our prior experience in interpreting the complex procedures by which postal rates and fees are set under the Act.²

¹ See 39 U.S.C. §§ 3621-25, 3641.

² See *Direct Mail Marketing Association, Inc. v. United States Postal Service*, 163 U.S. App. D.C. 157, 501 F. 2d 717 (1947); *Association of American Publishers, Inc. v. Governors of United States Postal Service*, 157 U.S. App. D.C. 397, 485 F. 2d 768 (1973); *Direct Mail Advertising Ass'n v. United States Postal*

While each case before us offers its own unique theory for invalidating the rates or fees it challenges, all three cases require an understanding of the rate-making procedure prescribed in the Act.

A. LEGISLATIVE REQUIREMENTS

Briefly put the Act created the Postal Service, "an independent establishment of the executive branch of the Government of the United States,"³ which is directed by an eleven member Board of Governors ("Board") composed as follows: nine presidentially appointed "Governors"; the Postmaster General, who is the "chief executive officer of the Postal Service"⁴ and is appointed by the Governors; and the Deputy Postmaster General, who is appointed by the Governors and the Postmaster General.⁵ Some powers are conferred on the Governors as distinct from the Board.⁶ The Act also created the independent, five member Postal Rate Commission ("Commission")

Service, 147 U.S. App. D.C. 394, 458 F. 2d 813 (1972); see also *Mail Advertising Corp. of America v. United States Postal Service*, 148 U.S. App. D.C. 158, 459 F. 2d 1182 (1972).

³ 39 U.S.C. § 201.

⁴ 39 U.S.C. § 203.

⁵ 39 U.S.C. § 202.

⁶ 39 U.S.C. § 102. For instance, the power to submit to the Commission a request for a recommended decision on changes in postal rates and fees is entrusted to the Postal Service and hence, under the terms of the Act, to the Board as the body which directs the exercise of power of the Postal Service, see 39 U.S.C. §§ 3622, 202 (a), while the power to act upon recommended decisions submitted by the Commission is entrusted to the Governors, see 39 U.S.C. §§ 3625, 3624.

which is charged with submitting to the Governors, upon request, "recommended decision[s] on changes in a rate or rates of postage or in a fee or fees for postal services."⁷

The ratemaking procedure prescribed by the Act may be summarized as follows. The Postal Service submits to the Commission a formal request for new rates or fees, which request may be accompanied by suggestions for rate adjustments which the Postal Service deems suitable.⁸ The Commission must provide an opportunity for a hearing on the record and, at the conclusion of this proceeding, must transmit its recommended decision to the Governors.⁹ The Governors then may approve the decision and order it into effect, or allow it to take effect under protest while seeking judicial review or Commission reconsideration, or reject it and have the Postal Service resubmit the request for reconsideration and a further recommended decision in which event the further recommended decision may, under limited circumstances, be modified by the Governors and put into effect as modified.¹⁰ An aggrieved party who appeared in the Commission proceedings may appeal the "decision of the Governors to approve, allow under protest, or modify the recommended decision," and the reviewing court "may affirm the decision or order that the entire

⁷ 39 U.S.C. §§ 3601-04, 3622-24.

⁸ 39 U.S.C. § 3622.

⁹ 39 U.S.C. § 3624. An officer of the Commission shall be appointed "to represent the interests of the general public" at the hearing. *Id.*

¹⁰ 39 U.S.C. § 3625.

matter be returned for further consideration, but the court may not modify the decision."¹¹

To avoid any prolonged disruption to the Postal Service's financial integrity which compliance with this elaborate procedure might cause, the Act also provides for the implementation of temporary increases in rates or fees. If the Commission "does not transmit to the Governors within 90 days after the Postal Service has submitted, or within 30 days after the Postal Service has resubmitted, to the Commission a request for a recommended decision * * * the Postal Service, upon 10 days' notice in the Federal Register, may place into effect temporary changes in rates of postage [or] in fees for postal service."¹²

A temporary rate or fee, however,

may not exceed the lesser of (1) the rate or fee requested for such class or service, or (2) a rate or fee which is more than one-third greater than the permanent rate or fee in effect for that class or service at the time a permanent change in the rate or fee of such class or service is requested under section 3622 of this title.¹³

In addition, if upon judicial review of a decision of the Governors on permanent rates, taken pursuant to 39 U.S.C. § 3628, the court "orders a matter returned to the Commission for further consideration, the Postal Service, with the consent of the Commission, may place into effect temporary [rates

¹¹ 39 U.S.C. §§ 3628.

¹² 39 U.S.C. § 3641(a).

¹³ 39 U.S.C. § 3641(c).

or fees]."¹⁴ Finally, judicial review of temporary rates or fees may be sought in the district court.¹⁵

B. PRIOR RATEMAKING PROCEEDINGS

To date three ratemaking proceedings have been initiated under the Act. The first proceeding (docket no. R71-1), which may be identified by its establishment of permanent 8 cent first class rates, began when the Postal Service submitted a request on February 1, 1971. Temporary rates were put into effect May 16, 1971, and on June 29, 1972, the Governors approved the Commission's recommended decision and ordered permanent rates put into effect. On appeal pursuant to 39 U.S.C. § 3628 this Court affirmed the Governor's order. *Association of American Publishers, Inc. v. Governors of the United States Postal Service*, 157 U.S. App. D.C. 397, 485 F. 2d 768 (1973) [hereafter cited as *American Publishers*].

The second proceeding (docket no. R74-1) established 10 cent first class rates. It was initiated with a request on September 25, 1973; temporary rates were put into effect March 2, 1974; and permanent rates were ordered September 4, 1975, after nearly two years of Commission proceedings. The NAGCP case seeks judicial review of this order pursuant to 39 U.S.C. § 3628.

The latest proceeding (docket no. R76-1), which may be identified by its proposal to establish per-

¹⁴ 39 U.S.C. § 3641(b).

¹⁵ Since "[s]ection 3628 which limits the jurisdiction of the courts, deals only with decisions of the Commission or the Governors; not with the Board of Governors—which exercises the power of the Postal Service to set temporary rates," *Mail Advertising Corp. of America v. United States Postal Service*, 148 U.S. App.

manent 13 cent first class rates, began with a request that was submitted September 18, 1975, and was resubmitted December 19, 1975.¹⁶ The ATCMU and State of Maine cases were brought in district court to enjoin implementation of temporary rates based on this request. Following district court orders in which injunctive relief was granted on procedural grounds (ATCMU), but denied on substantive grounds (State of Maine), appeals were taken to this Court. We stayed the district court injunction, and on December 31, 1975, temporary 13 cent first class rates were put into effect.

II. Nos. 75-1856, 75-1857: THE NAGCP CASE

The first case involves the second ratemaking proceeding conducted under the Act and is before us on NAGCP's petition to review the September 4, 1975 order of the Governors which approved the Commission's recommended decision and ordered into effect the permanent rates there recommended.

In that proceeding the Commission, after receiving the Postal Service's September 25, 1973 request for a recommended decision, assigned Chief Administrative

D.C. 158, 159, 459 F. 2d 1182, 1183 (1972), temporary rates are reviewed in the district court rather than the Court of Appeals.

¹⁶ At the same time the Postal Service sought also to implement permanent changes in fees for certain services. However, rather than including these proposed changes in its request for changes in postage rates, the Service sought to implement the fee increases simply by notice in the Federal Register with opportunity provided for comment by interested parties. Whether changes in such fees are subject to Commission jurisdiction and hence to the procedures of request, Commission hearing, recommended decision and Governors' order is a major issue in the ATCMU case and is discussed there.

Law Judge ("ALJ" or "Judge") Seymour Wenner, who had presided at the first ratemaking proceeding,¹⁷ to preside at the hearing.¹⁸ Taking part in the hearing, which began June 27, 1974, were some 29 full participants and 17 limited participants.¹⁹ Extensive evidence was taken over some 46 days of hearings, the record being closed on December 20, 1974.²⁰

After briefing, issuance of the ALJ's initial decision (May 28, 1975), and two days of oral argument before the Commission, the case was submitted to the Commission, which transmitted its recommended decision to the Governors on August 28, 1975. The Governors' implementing order and this appeal followed.²¹

¹⁷ See *American Publishers*, 157 U.S. App. D.C. at 408 n.18, 485 F.2d at 779 n.18 (Bazelon, C.J., concurring).

¹⁸ 1—478. In accordance with 39 U.S.C. 3625(e) the record of the proceedings has been printed. It is organized into four main volumes. References to the record will be indicated by citation to the appropriate volume and page number in the following manner: ————.

¹⁹ 1—478. Among the participants were United Parcel Service of America, Inc., American Business Press, Inc., and National Newspaper Association, all three of which intervened in this appeal and filed briefs. Also participating in this appeal, as amicus curiae, is State of Maine, et al., appellant in No. 75-2238.

²⁰ "Ten witnesses appeared on behalf of the Postal Service, six for the [officer of the Commission], thirty-eight for other parties and two were called by the Judge." 1—479.

²¹ As in *American Publishers* our jurisdiction is invoked pursuant to 39 U.S.C. § 3628, which provides us with exclusive jurisdiction, mandates that we make this matter a preferred cause on our calendar, and prohibits us from suspending the permanent rates pending decision.

On September 4, 1975, the same day the Governors issued the order implementing the permanent 10 cent rates contested in NAGCP, the Board directed that a new request seeking further increases be submitted to the Commission. That directive resulted in the commencement of Commission proceedings on permanent

A. 39 U.S.C. SECTION 3601

At the outset we are met with the contention that the Commission, at the time it considered and com-

13 cent rates (docket no. R76-1). It also resulted, on December 31, 1975, in the implementation of the temporary 13 cent rates that are contested in ATCMU and State of Maine. See pp. 46-47 *infra*. All three cases were argued February 20, 1976. On June 30, 1976, the Commission transmitted to the Governors its recommended decision in docket no. R76-1, recommending implementation of permanent 13 cent rates; on July 7 the Governors approved the recommended decision; and on July 18 the permanent 13 cent rates became effective pursuant to the Governor's July 7 order. See 41 Fed. Reg. 29570 (July 16, 1976). The July 7 order is being challenged in this Court in *National Association of Greeting Card Publishers v. United Postal Service*, No. 76-1611.

No party to this appeal directed the Court's attention to the potentially significant events which occurred subsequent to oral argument. To say the least this failure, especially on the part of the Postal Service, is difficult to explain and hard to excuse. Since we may take judicial notice of such events and of the record in the related case, however, the implications of the Postal Service's subsequent action need not escape our review.

Although implementation of the new permanent rates may preclude this Court from presently providing an effective remedy for any injury incurred as the result of the prior, allegedly unlawful permanent rates, see 39 U.S.C. §§ 3628, 3681, the appeal need not be dismissed as moot. Petitioner has a continuing interest in the establishment of postal rates that comply with the Act, and it appears from the record in No. 76-1611 that the new permanent rates are based on a methodology significantly similar to that which petitioner here challenges as violative of the Act. See pp. 67-68 *infra*. In short, it appears that the same controversy between the same parties has arisen anew. Moreover, less than eleven months elapsed between the order implementing permanent 10 cent rates, which prompted the instant petition to review, and the implementation of the permanent 13 cent rates, which is the basis of a suggestion of mootness, and there is nothing to indicate that this cycle will not be repeated to the possible frustration of future

posed its recommended decision, was improperly constituted under the Act and that therefore the actions it took regardless of their validity otherwise, are without force and effect.

Section 3601 of the Act establishes the Commission and mandates that it be "composed of 5 Commissioners appointed by the President, not more than 3 of whom may be adherents of the same political party." At the time in question three of the Commissioners were members of the Republican Party while one was a member of the Conservative Party of New York State. The claim of improper composition rests in essence on the assertion that these two political parties are "the same political party" within the meaning of section 3601.

No claim is made that the organization of either party is a sham²² or that one party exercises control

petitions to review. Indeed, representations of the Postal Service as to its present financial difficulties and the streamlining of Commission proceedings may suggest that the current permanent rates will be even shorter lived than their predecessors. In sum, the instant controversy falls squarely within the "capable of repetition, yet evading review" exception to mootness and therefore satisfies the case or controversy prerequisite to federal jurisdiction. *Roe v. Wade*, 410 U.S. 113, 124-25 (1973) (nine month human gestation period too short for completion of usual appellate process); see also note 107 *infra* and cases cited therein.

²² For obvious reasons the argument is directed at the Conservative Party of New York and Commissioner O'Doherty rather than the Republican Party and its three Commissioners. However, we have already recognized the validity of the Conservative Party. See *Buckley v. Valeo*, — U.S. App. D.C. —, — & nn. 115, 118, 519 F. 2d 821, 865-67 & nn.115, 118 (1975) *aff'd in part and rev'd in part*, 424 U.S. 1 (1976), *modified*, — U.S. App. D.C. —, 532 F. 2d 187 (1976). See also *Cooke v. Lomenzo*, 31 N.Y.2d 244, 288 N.E.2d 291, 336 N.Y.S.2d 457 (1972); *Pichler v.*

over the other.²³ Rather, the heart of the argument is an assertion of sameness predicated on an evaluation of certain similarities in the political philosophies of the two parties. Believing it well outside our proper judicial role to undertake such an analysis, we exercise no jurisdiction and express no views whatsoever on the issue. See *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Coleman v. Miller*, 307 U.S. 433, 453-54 (1939).

Furthermore, even were we to assume that the Commission was improperly composed, there is a separate and independent reason why the actions here challenged would still be valid. At least since *Ex parte Ward*, 173 U.S. 452 (1899), the law has been clear that:

A person actually performing the duties of an office under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned.

United States ex rel. Doss v. Lindsley, 148 F. 2d 22, 23 (7th Cir. 1945), *cert. denied*, 324 U.S. 863 (1945);

Jennings, 347 F. Supp. 1061 (S.D.N.Y. 1972). And Commissioner O'Doherty's allegiance to the Conservative Party can hardly be doubted in view of the fact that at the time in question he was not only a registered voter but also a state official of the Party. See also *Application of Leichter*, 32 Misc. 2d 234, 223 N.Y.S.2d 789 (1961) (member of political party is bound by party rules).

²³ See note 22 *supra*. For example, in 1970 James Buckley won election to the Senate as a member of the Conservative Party by defeating a Republican Party opponent. *The World Almanac and Book of Facts 1971*, at 37 (L. Long ed.); *Congressional Quarterly's Guide to U.S. Elections* 500 (R. Diamond ed.). See also *Buckley v. Valeo*, — U.S. App. D.C. —, — & n.118, 519 F. 2d 821, 867 & n.118 (1975) *aff'd in part and rev'd in part*, 424 U.S. 1 (1976), *modified*, — U.S. App. D.C. —, 532 F. 2d 187 (1976).

see *United States v. Krueger*, 319 F. Supp. 225, 226-27 (N.D. Ill. 1970). In short, the remedy for improper composition is not invalidation of the Commission's action through indirect challenge, but rather removal of the allegedly disqualified Commissioner by way of direct attack.²⁴ See, e.g. *Ryan v. Hershey*, 445 F. 2d 560 (8th Cir. 1971), *cert. denied*, 404 U.S. 1004 (1971); *United States v. Chaudron*, 425 F. 2d 605 (8th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970); *United States v. Brooks*, 415 F. 2d 502 (6th Cir. 1969), *cert. denied*, 397 U.S. 969 (1969).²⁵

²⁴ 39 U.S.C. § 3601; 5 U.S.C. § 7521. In addition, *quo warranto* might also be available as a direct attack device. But see *Newman v. United States ex rel. Frizzel*, 238 U.S. 537 (1915); *Blackburn v. O'Brien*, 289 F. Supp. 289, 292-93 (W.D. Va. 1968); see also *United States v. Machado*, 306 F. Supp. 995, 1000-02 (N.D. Cal. 1969).

²⁵ *United States v. Williams*, 317 F. Supp. 1363 (E.D. Pa. 1970), does not require an opposite conclusion. That case, and the case upon which for this point it relies exclusively, *United States v. Machado*, 306 F. Supp. 995 (N.D. Cal. 1969); see also *United States v. Lemke*, 310 F. Supp. 1298 (N.D. Cal. 1969), *set aside* 439 F. 2d 762 (9th Cir. 1969); *United States v. Beltran*, 306 F. Supp. 385 (N.D. Cal. 1969), represent a line of authority inapposite to the instant case. *Williams* and *Machado* hold that a defendant being prosecuted criminally for failure to report for and submit to induction may raise as a defense the allegation that the local draft board was not duly constituted and that therefore the prosecution is unable to establish an essential element of its case, i.e. that the draft board complied with all applicable selective service regulations. The district courts in both cases entered judgments of acquittal.

We need not decide whether *Williams*, *Machado*, and cases following them represent the correct view on this issue. Compare *United States v. Nussbaum*, 306 F. Supp. 66 (N.D. Cal. 1969), and cases cited in text at this footnote; see also *United States v. Reeb*, 433 F. 2d 381 (9th Cir. 1970), *cert. denied*, 402 U.S. 912 (1970) (affirming conviction despite the assumed fact that board mem-

B. 39 U.S.C. SECTION § 3622

On the merits the case focuses on 39 U.S.C. § 3622, the section of the Act which sets forth the cost and noncost considerations that the Commission must take into account in setting rates. The "most concrete"²⁶ of these, and only one of the subsections which deals expressly and exclusively with most factors,²⁷ is subsection 3622(b)(3) which establishes

the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type.²⁸

bers had not met the residency requirements, even assuming these requirements were mandatory rather than directory). All these cases involve the question whether the issue of an agency member's qualifications may be raised as a defense to a criminal prosecution for violation of an order of that agency. They do not, as in the instant case, ask whether the issue may be raised by way of an affirmative collateral attack upon the validity of the order as part of a civil suit directly challenging the substance of the order. The interest which justifies the general rule, i.e. avoiding "the uncertainty that would otherwise cloud * * * official public acts," *Nussbaum, supra*, 306 F. Supp. at 68, may be outweighed where criminal conviction could result from strict adherence to the rule and where raising the issue in the criminal proceeding may be the only practical avenue open to the defendant at that time. See *McKart v. United States*, 395 U.S. 185 (1969); *Yakus v. United States*, 321 U.S. 414 (1944). The cases which have carved out the exception rely on just such a balancing. See e.g., *Williams, supra*, 317 F. Supp. at 1367, 1370. In the instant case, however, no such countervailing interest exists.

²⁶ *American Publishers*, 157 App. D.C. at 406, 485 F. 2d at 777 (Bazelon, C.J., concurring).

²⁷ See pp. 37-39 *infra*.

²⁸ U.S.C. § 3622(b)(3) (emphasis added).

In response to section 3622 the Commission developed for this proceeding, and the Governors adopted by their order, a two-step process for allocating among the classes of mail all the costs of operation. While each step will be described more fully below,²⁹ the Commission's approach may be summarized at the outset as follows. The Commission sought as its first step to identify and allocate to each class of mail those costs which in its view indisputably were the result of providing that particular service. A rate floor for each class of mail, *see* note 58 and accompanying text *infra*, was thus established by "attributing"³⁰ a portion of the total costs on the basis of "cost variability"—an approach which evaluates changes in costs as a function of changes in output volume. As its second step, in order to take into account the noncost factors of section 3622, the Commission then judgmentally "assigned" all the remaining costs on the basis of demand

²⁹ The Commission's "attribution" method is described *infra* at pp. 19–21. Its method for "assignment" of unattributed costs is discussed *infra* at pp. 21–23.

³⁰ As will become apparent below, the parties have attached differing meanings to the term "attributable" as used in subsection 3622(b)(3). The Commission equates attributable costs with marginal costs as that concept is defined in strict economics theory—a concept which imports notions of cost variability. Other parties, while not disputing that attribution connotes a cause and effect relationship, note that courts not infrequently construe the term in a less exacting manner than reliance on strict economics theory would permit. These parties offer varying definitions under which attribution would be accomplished by inferences of causation based on factors other than cost variability.

This debate is central to the case and is resolved below. However, to simplify discussion of this issue, we will use the term "attributable" throughout this opinion, unless otherwise indicated, in its nontechnical sense as implying no more than the existence of a cause and effect relationship, however that may be evidenced.

factors designed to determine "what the traffic will bear" in each class of mail.³¹ Under this "inverse elasticity rule" approach, final rates evolved by assigning all the unattributed costs to the various classes of mail in inverse proportion to the relative elasticity of demand for each class; *i.e.*, those classes of mail in which increases in rates hypothetically would cause lesser decreases in patronage were made to shoulder larger portions of the unattributed costs, while those with greater elasticity of demand were burdened with smaller markups above their attributed costs. Petitioner advances separate arguments to dispute each element of the Commission's approach.

1. Commission's Approach to Subsection 3622(b)(3) and ALJ's Alternative Approach

a. *Attribution.*—The premise of the Commission's approach to attribution is its belief that costs variability is the only proper indicator of causation. As the Commission explains,

if a particular cost varies with a change in volume units, we infer that the cost is caused by such change and can be attributed to the class or service experiencing the change.

From volume variability, therefore, we can infer, and thereby establish, the causation that we seek. And by establishing minimum rates based on variable costs, we assure ourselves, the public, and Congress that no class has cross-subsidized any other class.³²

³¹ *See Payne v. Washington Metropolitan Transit Comm'n*, 132 U.S. App. D.C. 321, 336, 415 F. 2d 901, 916 (1968).

³² 1—589 (footnote omitted). The Commission also attributed in this proceeding certain "specific fixed costs," *i.e.*, those costs which in the Commission's view can be identified with a single class of

The basic principles of this cost-of-service approach have remained unchanged since the Commission first adopted cost variability as its attribution methodology in the initial rate proceeding.³³

The touchstone of the cost variability approach is the Commission's concern that causation be measured as accurately as possible—that within the bounds of available data, all elements of approximation or estimation be excluded.

[W]e believe that causation is both the statutory and the logical basis for attribution. Where an analysis based on causation cannot be made because data are lacking, we will do better to acknowledge that fact and press for a better data base than to construct an "attribution" on a basis not contemplated by the statute.³⁴

The stricture of this approach and the unavailability of complete data led in the first two rate proceedings to recommended decisions which, by the Commission's own account, did not attribute to each class

service without regard to volume. See 1—577. As defined by the Commission, however, these costs are almost insignificant, comprising, approximately one percent of total costs. *Id.*

³³ To be sure there have been modifications of the formula. For instance, in the first proceeding attributable costs were strictly confined to those costs which vary in direct proportion to the number of pieces of mail from year to year, whereas in the proceeding here under review the Commission adopted a reasonable "planning cycle" period rather than the strict one year time span, see 1—482, and indicated a movement away from the confines of direct proportionality. But as Judge Wenner concluded, "in filing its proposal in [the second proceeding]. . . Postal Service adopted substantially the same methods and principles it had used in the first proceeding." 1-2.

³⁴ 1—587-88.

all the costs that likely were the result of providing the particular service.³⁵ In the first proceeding attributable costs were set at 49% of total costs. In the proceeding here under review the Commission, after revising upward the Service's proposal to attribute only 45.1% of costs, recommended that 52.5% of all costs be attributed.³⁶

b. *Assignment.*—The Commission used demand theory to assign all the remaining, unattributed costs (47.5%). An understanding of the Commission's approach requires an initial familiarity with the concept of demand elasticity. Simply put, the demand for a product is said to be elastic if lowering its price by a specific percentage leads to a greater percentage increase in the volume sold, or if raising its price by a specific percentage leads to a greater percentage reduction in its volume.³⁷

³⁵ The Commission noted, for instance, that "[w]here the record is incomplete or inadequate for [volume variability] analysis, we have not attempted to carry the attribution process farther than our data permit. Instead, we have assigned the relevant costs according to the noncost standards of the statute." 1—483. And it went on specifically to state its view that "more costs can and will be attributed in future cases." 1—484.

³⁶ Despite the percentage increase in attribution between the first and second proceedings, the amount of remaining costs subject to the Commission's judgmental assignment rose by some \$1.5 billion as a result of an increase in total costs from \$9.84 billion to \$12.04 billion.

³⁷ 1—16. The coefficient of elasticity is computed mathematically by dividing a percentage change in volume by the associated percentage change in price. If the resulting number is between -1.0 and 0, i.e., a coefficient of elasticity of less than unity, demand is said to be inelastic; e.g., where a 10% price increase results in only a 5% or 3% volume decrease the coefficient of elasticity is -0.5 and -0.3 respectively. If, on the other hand, the resulting number

Elasticity of demand forms the cornerstone of a demand theory (or "value-of-service") approach to apportioning costs. Such an approach seeks to minimize the impact that an increase in rate will have on services with positive demand elasticities by "impos[ing] on the services in relatively inelastic demand * * * higher surcharges, over and above marginal costs, than would be imposed by *any* rule of apportionment based exclusively on cost relationships."³⁸

The Commission has developed, and used in both the first and second rate proceedings, a specific formulation of demand theory—what it calls the "inverse elasticity rule"—as a guide in assigning unattributed costs. Under this rule final rates are derived by assigning to the various classes of mail different mark-ups (above attributed costs) in inverse proportion to the relative elasticity of demand for each of the classes. It is the Commission's position that generally by using demand factors, and specifically by testing its recommended rates against the inverse elasticity rule, it "can assign costs in a manner that fully takes into account the noncost factors of the statute."³⁹

is of a magnitude greater than -1.0 i.e. a coefficient of elasticity of greater than unity. demand is said to be elastic; e.g. where a 10% price increase results in a 20% or 30% volume decrease the coefficient of elasticity is -2.0 and -3.0 respectively. Coefficients of elasticity almost always bear negative signs because increased prices almost always produce decreased volumes, and vice versa, and therefore the numerator and denominator of the fraction will generally have opposite signs.

³⁸ *J. Bonbright, Principles of Public Utility Rates*, 378 (1961) (emphasis in original).

³⁹ 1—627; see 1—660–66.

The Commission acknowledges that all classes of mail are basically insensitive to price increases, and that demand in each class, at least at present and reasonably foreseeable rates, is technically inelastic—that is, a rate increase in any class of mail will necessarily generate an increase in revenue albeit at reduced volume.⁴⁰ Generally demand theory is used to minimize the impact that a rate increase otherwise would have on products that are demand elastic. The Commission posits, however, that despite the high degree of inelasticity that presently prevails among all classes of mail, demand theory is nonetheless proper in postal ratemaking since it may be based on *relative* demand elasticities (or, more accurately, relative *inelasticities*). Accordingly, in the instant proceeding the Commission purported to develop a ranking of relative price sensitivity among the classes of mail and, based on this ranking, sought to establish the "optimum rate for each mail class and service," which is defined as "that rate which maximizes the volume of mail while recovering all the related attributable costs and making some contribution to the fixed overhead, so that in the end total costs are recovered."⁴¹

c. *Alternative approaches.*—In recommending its attribution/assignment methodology to the Governors, the Commission rejected entirely the initial decision proposed by Administrative Law Judge Wenner and instead stood by the approach it first developed in the inaugural rate proceeding. In that proceeding ALJ (then Chief Examiner) Wenner severely criticized both the Commission's use of cost variability as its

⁴⁰ 1—640.

⁴¹ 1—625.

approach to attribution⁴² as well as the Commission's reliance on the inverse elasticity rule as a guideline for assigning all the remaining costs.⁴³ However, constrained in that proceeding by the minimal cost data presented, the unavailability of alternative methodologies, and the "presumptions that surround an initial effort to formulate rates," the ALJ as well as this Court left undisturbed the Commission's initial use of cost variability and demand theory.⁴⁴

When presented in the instant proceeding with the same approach, essentially unchanged, ALJ Wenner determined that the presumptions noted earlier no longer prevented full review.⁴⁵ Adopting and refining alternative methodologies advanced by various parties to the proceeding,⁴⁶ and using only the data provided in the Service's own submission, the ALJ proposed to the Commission an entirely different approach to attribution/assignment under which the ALJ attributed some 70.6% of costs and assigned the remaining costs primarily in accordance with cost-of-service rather than value-of-service principles.

⁴² See *American Publishers*, 157 U.S. App. D.C. at 405-06 & nn.1, 6, 485 F. 2d at 776-77 & n.1, 6.

⁴³ See *id.* at 407, 485 F. 2d at 778.

⁴⁴ *Id.* at 407, 408, 485 F. 2d at 778, 779; see also 1-867.

⁴⁵ "Postal Service's presentation in this proceeding makes it clear that the first and primary task of the Postal Rate Commission is to remedy the Service's deficient determination and attribution of costs. * * * The task is no longer to criticize and exhort; it is to do the job—now." 1-4.

⁴⁶ Judge Wenner noted that in the first proceeding the Commission "was constrained to accept Postal Service's attributable costs because no party had presented alternative costs and because the record did not provide a reliable basis for doing so," whereas in this proceeding several parties, including NAGCP, presented full cost data and alternative methodologies. 1-4.

The ALJ's attribution method proceeds from a premise quite at odds with that of the Commission. Whereas the linchpin of the cost variability approach is an abiding concern for the greatest possible accuracy in measuring causation, the ALJs' alternative approach devalues somewhat the interest in utmost accuracy in order to pursue more fully the goal of maximized attribution.⁴⁷ Simply put, the alternative approach relies on cost accounting principles to augment the inferences of causation derived through the use of the cost variability theory. Additional attribution results from using distribution keys such as weight, volume and number of pieces of mail to apportion among the postal services affected those cost segments which clearly affect more than one service and which, although not measurably variable on presently available data, are reasonably susceptible to such apportionment. The approach is perhaps best understood by using transportation costs as an illustration of the method as applied.⁴⁸

The transportation segment as constructed by the ALJ includes all the costs the Postal Service incurs, both for purchased and self-furnished services, to carry mail from the patron's collection point to the receiving point, including, in addition to salaries, the costs associated with the servicing, maintenance and

⁴⁷ As Judge Wenner put it "[T]he difference[] between CALJ costing and USPS costing is not merely a difference in small adjustments about whether this or that cost is related to this or that class of mail. The difference is that CALJ costing practices pursue a different aim, with improvements in light of criticisms in the record, the aim of tracing all cost consequences of providing a particular class of mail. Postal Service never attempted such an attribution. * * * 1-20, n.1.

⁴⁸ See generally 1-5-6.

depreciation of vehicles. It does not include, however, the actual delivery function, *i.e.*, handing the mail to the patron or putting it in the patron's box, which comprises a different cost segment. In the instant proceeding total transportation costs were \$2.621 billion, of which the Postal Service attributed only \$545 million (21%), characterizing the remaining \$2.076 billion as fixed costs subject to judgmental distribution. The ALJ, however, by analyzing the transportation function as being governed by considerations of the weight and cubic volume of the mail handled (as contrasted with the actual delivery function which is more a factor of the number of pieces of mail⁴⁹) was able to attribute \$2.565 billion (98%), leaving only \$56 million subject to discretionary assignment. His reasoning was straight-forward:

The cubic volume of mail determines the number and size of the vehicles required which affects the maintenance, fuel and lease costs. The weight of the mail affects the loading and unloading effort and also bears on the needed carrying strength and operational expenses of the vehicle. The cost of drivers varies with vehicle operations.

The cost of the mail carrier's walking (or driving a vehicle) over his route is governed by weight and space. What he can carry in his pouch and his hands is affected by the weight (35 pounds maximum under Postal Regulations) and the size (in cubic volume) of the load; this determines how often he must return to the relay box or to his car. The weight and cubic volume

⁴⁹ See 1—5.

of mail also affects the size of the vehicle he needs (where he has one).⁵⁰

The ALJ's method for assigning the remaining costs is also quite opposed to the principles underlying the Commission's adopted approach; it proposes complete rejection of the inverse elasticity rule.⁵¹ Under the alternative approach each class of mail bears that portion of unattributed costs equal to its proportionate share of attributed costs unless individual and specific consideration of the noncost factors contained in section 3622(b) requires deviation from the standard markup.⁵²

2. Requirements of Section 3622

Relying in large measure on the criticism leveled in the ALJ's initial decision, petitioner argues that the Commission's attribution/assignment approach is violative of the Act in several respects. Initially petitioner asserts that the Commission's cost variability method is a too restrictive approach for attribution which permits the expense incident to one service to be thrown upon the customers using another service, resulting in unlawful cross-subsidization. *See, e.g., Northern Pacific Railway Co. v. North Dakota*, 236 U.S. 585, 597–98 (1915). Petitioner also attacks the Commission's reliance on demand theory, and in particular its use of the "inverse elasticity rule," as a means for assigning all unattributed cost, arguing that this approach preserves historical rate differen-

⁵⁰ 1—5 (footnote omitted).

⁵¹ 1—660.66.

⁵² 1—20. One factor of which Judge Wenner understandably made particular note was the impact upon mail users that might result if in switching from past, oftentimes artificial rates to the present, more representative rates the standard markup would impose too drastic an increase. *See* 39 U.S.C. § 3622(b) (4); 1—20.

tials and otherwise unduly and unreasonably discriminates against first class mail. *See* 39 U.S.C. § 403(c).

The foundation of both arguments is the assertion that the Act imposes a special obligation that allocation in accordance with cost-of-service principles be carried out as far as reasonably possible. In *American Publishers* we found "a strong indication" that Congress intended to impose just such a special obligation.⁵³ In that case, however, in view of "the presumptions that surround an initial effort to formulate rates" we found it unnecessary to go beyond a mere preliminary assessment of the import of subsection 3622(b)(3).⁵⁴

In this case, now that the Commission has had some five years of experience with the Act, the formidable task of definitively interpreting subsection 3622(b)(3) may no longer be deferred. We must first determine whether a thorough examination of the statute bears out our earlier assessment—whether, in short, the Act requires that special efforts be made to trace all the cost consequences of providing the various services and to allocate costs on this basis to the fullest extent reasonably possible. Only then may we evaluate the Commission's approach for compliance with the Act.

⁵³ 157 U.S. App. D.C. at 408, 485 F. 2d at 779. In that case we were confronted with a methodology not significantly different from that presently before us. We observed there that the Commission's initial response to the concrete requirements of subsection 3622(b)(3) appeared "questionable at best." *Id.* at 406, 485 F. 2d at 777.

Unless otherwise indicated all references to *American Publishers* hereinafter are to the concurring opinion of Chief Judge Bazelon in which Judges Tamm and Wyzanski joined.

⁵⁴ *Id.* at 408, 485 F. 2d at 779. As we observed there, "Section 3622(b)(3) is susceptible of a variety of interpretations." *Id.*

a. *Interpreting subsection 3622(b)(3).*—We begin with the words of the statute. As noted above, subsection 3622(b)(3) requires that "each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type."⁵⁵

Three important points are immediately apparent. First, unlike any of the other ratesetting factors contained in section 3622(b), subsection (b)(3) is set forth as a "requirement",⁵⁶ a fact which suggests its

⁵⁵ Section 3622(b) provides in full:

(b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:

"(1) the establishment and maintenance of a fair and equitable schedule;

"(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

"(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

"(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

"(5) the available alternative means of sending and receiving letters and other small matter at reasonable costs;

"(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

"(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services; and

"(8) such other factors as the Commission deems appropriate."

⁵⁶ *See* note 55 *supra*; *see also* pp. 37-38 *infra*.

special role in the Act's ratesetting scheme. Second, the section uses words which further emphasize its importance by suggesting a substantial breadth to its coverage. For instance, both attribution and assignment are designed to reach "each" of the classes of mail and types of service. Moreover, not only "direct" but also "indirect" postal costs are to be attributed, and thereafter a portion of "all other costs" of the Postal Service are to be assigned. Third, the emphasis throughout the subsection is unmistakably upon cost-of-service principles. Under the subsection each service must bear the postal costs "attributable to [it]" and in addition must also bear that portion of all other costs "reasonably assignable to [it]" (emphasis added). Thus, the very words of subsection (b)(3) disclose its concern that each class of mail and postal service shoulder all the postal costs that may reasonably be traced to the provision of that class or service.

Giving the statute a plain reading it seems clear that the first of the subsection's dual requirements calls for something more than minimal attribution. Had Congress intended, for instance, that cost variability be acceptable as an exclusive method for identifying attributable costs, it in all likelihood would not have given seemingly equal importance to the attribution of indirect, as of direct, postal costs. Strictly speaking, indirect costs may not be attributed by cost variability, at least not by short-term variability; rather, attribution of such costs as a practical matter necessitates the use to some degree of cost allocation formulae based on accounting principles.⁵⁷

⁵⁷ See 1 A. Kahn, *The Economics of Regulation: Principles and Institutions* 78 (1970).

Moreover, the report of the conference committee confirms the view that Congress intended attribution under subsection 3622(b)(3) to extend beyond minimally attributable costs and to include to a significant extent those additional costs which, although not measurably variable and therefore not directly attributable, may nonetheless be determined with reasonable confidence to be the consequence of providing the service.⁵⁸

A plain reading also clearly suggests that the other costs of the Postal Service that are to be "reasonably assigned" must also be allocated on cost-of-service principles. That is, after the process of extended attribution is complete, a portion of remaining costs are to be assigned to the various mail classes and postal services to the extent that it can reasonably be determined or estimated that certain classes of service may account for particular costs. As discussed above, a primary theme of subsection 3622(b)(3) is its concern with fully tracing the cost consequences of providing the various services. Legislative history, which is explored more thoroughly below, confirms that this theme pertains as much to assignment as to attribution.⁵⁹

⁵⁸ H.R. Rep. 91-1363, 91st Cong., 2d Sess. 87 (1970) (the attribution provision "establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that vary over the short term in response to changes in volume of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved").

⁵⁹ See pp. 34-39 *infra*. The provision that the various postal services should bear the "operating costs, the amount of overhead, and other institutional costs of the Postal Service properly assignable to each class of mail or type of mail service"

One last feature of subsection 3622(b)(3) is disclosed by giving the words of the statute their plain

(emphasis added) was first contained in the Senate bill submitted to conference. *See* text at note 72 *infra*. Under this provision, each mail class or postal service, in addition to bearing "operating costs"—which one might reasonably equate with attributable costs—would also have been required to bear some portion of "overhead" and "other institutional costs of the Postal Service" at least to the extent that a cause and effect relationship between those costs and the mail class or postal service to which they were to be assigned could properly be determined. *See* S. Rep. 91-913, 91st Cong., 2d Sess. 15 (1970); *see also id.* at 10. While more specifically directed to institutional costs in addition to operating costs than the House bill, the Senate provision paralleled in certain respects the House provision that "rates for each class of postal service cover the demonstrably related cost of such service." H.R. Rep. 91-1363, 91st Cong., 2d Sess. 87 (1970) (conference report); *see* text at note 70 *infra*.

At conference the Senate's version was adopted with an amendment that strengthened the role of this particular subsection, *see* pp. 37-38 *infra*, and added the attribution provision discussed above. However, while adding this provision, the conference bill nonetheless retained almost verbatim the Senate language regarding the assignment of overhead and other institutional costs, making only the most minor, cosmetic changes—*e.g.*, the applicable costs became described generally as "all other costs of the Postal Service," and "properly assignable" became "reasonably assignable."

In short, the "reasonable assignable" costs provision of subsection (b)(3) quite clearly continues the concept of its Senate bill predecessor that even overhead and other nonvarying institutional costs are to be allocated among the classes of mail and types of mail services on a cost-of-service basis to the extent it is reasonably possible to allocate specific costs to specific postal classes and services.

This interpretation of "reasonably assignable" costs fully comports with the significant differences between the rate-setting requirements of the preferred and nonpreferred classes of mail.

meanings. Congress did not intend that *all* postal costs be either attributed or assigned. Rather, the statute expressly provides that each class of mail or type of mail service must bear, in addition to its attributable costs, only "that portion of all other costs of the Postal Service *reasonably assignable* to such class or type" (emphasis added). Thus, some Postal Service costs will exist but will not be "reasonably assignable" to any particular class or type. The other factors enumerated in section 3622 will govern the allocation of these nonattributable and nonassignable costs. This makes good sense. With subsection 3622(b)(3) strengthened from a guideline into the only "requirement" among the eight ratesetting factors listed in section 3622, unless express provision were made for a third category of costs subsection

Under subsection 3622(b)(3) a nonpreferred class of mail or type of mail service is required to bear, in addition to its attributable costs, that portion of the remaining costs reasonably assignable to it as well as any part of the residuum of costs that the Commission discretionarily allocates to it, *see* pp. 38-39 *infra*. By contrast, under section 3626, the section adopted at conference for the purpose of retaining certain rate preferences, *see* S. 3842, 91st Cong., 2d Sess. (1970), at § 3704(i), so long as Congress appropriates funds to offset the foregone revenue, *see* 39 U.S.C. §§ 2401(i), 3627, the rates for the preferred classes of mail or kinds of mailer must be set so that the revenues received from those rates will not, after a phasing-in period, *see* 39 U.S.C. § 3626(1), "exceed the direct and indirect postal costs attributable to mail of such class or kind (excluding all other costs of the Postal Service)." While both attributable and assignable costs, as used in subsection 3622(b)(3), involve inferences of causation, the latter concept permits a greater degree of estimation and connotes somewhat more judgment and discretion than the former. *But see* note 74 *infra*. It is the freedom from having to bear either these more speculative costs of service or any portion of the residuum costs that constitutes the "preference" enjoyed by the classes of mail provided for in section 3626.

3622(b)(3) would be susceptible of an interpretation by which all the noncost factors of the remaining subsections could be read out of the Act. The conference report confirms that Congress acted expressly to prevent just such an interpretation.⁶⁰ While clearly the primary purpose of the Act's ratesetting provision is to assure that attribution and assignment in accordance with cost-of-service principles is carried out to the fullest extent reasonably possible, subsection (b)(3) provides at the same time for a residuum of costs to be used to give effect to the noncost factors expressly set forth in the Act.

Legislative history fully supports the plain reading of subsection 3622(b)(3) and reinforces the conclusion that first and foremost the Act requires that special efforts be made to maximize the use of cost-of-service principles in the allocation of postal costs.

Discrimination in postal ratemaking in favor of certain preferred classes of mail and to the great disadvantage of first class mail has long been a part of our postal system. As early as 1913 the Supreme Court, in *Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 303-304 (1913), recognized that Congress designed its postal rate structure to discriminate among classes of mail, conferring "pecuniary advantages of great consequence" upon certain classes of mail, always at the expense of first class, based "upon the conceptions of Congress as to how far it was wise for the general welfare to give advantages to one class not enjoyed by another." This practice, increas-

⁶⁰ H.R. Rep. 91-1363, 91st Cong., 2d Sess. 87 (1970) ("the conference substitute provides a judgmental assignment of *some part* of the remaining costs") [emphasis added]; see also note 59 *supra*.

ingly more formalized through the years, continued until the time of the Postal Reorganization Act.⁶¹

In seeking postal reform through the 1970 Act it was a central and express aim of both Houses of Congress to end the abuses of this practice—to get "politics out of the Post Office."⁶² Congress realized that the result of this purposeful discrimination—the setting of rates for some classes of mail well below that necessary to recover the costs of providing the service⁶³—was symptomatic of the political process. De-

⁶¹ For instance, in 1955 the Post Office Department formally adopted a ratemaking formula which expressly provided that second and third class mail should be operated below cost and that the revenues thus lost should be recovered through increased rates for first class mail.

"Second-class mail should produce revenues sufficient to recover 50 percent of costs assigned to it under the Cost Ascertainment System; third-class mail should recover 75 percent of such costs; and * * * the difference should be reallocated to first-class mail and domestic airmail in recognition of their higher service and value factors."

Post Office Department Cost Ascertainment Report for FY 1955, at III; see 1-859. And the Postal Policy Act of 1958, the statutory predecessor to the present Act for purposes of ratemaking, formalized the practice of requiring first class to bear its full costs plus a premium in order that the rates for the preferred classes could be set at less than full cost. See 39 U.S.C. §§ 2302(c), 2303 (1958), 72 Stat. 136. For the Post Office Department's explanation of the differential pricing permitted by the Postal Policy Act of 1958, see *Report on Post Office Department Relating to Survey of Postal Rate Structure*, House Doc. No. 91-97, 91st Cong., 1st Sess. 6 (1960).

⁶² H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 6 (1970); see S. Rep. No. 91-912, 91st Cong., 2d Sess. 8 (1970).

⁶³ "Under existing law, first-class mail and fourth-class parcel post are the only classes of mail in which there is any legislative requirement at all that they pay their full cost." S. Rep. No. 91-912, 91st Cong., 2d Sess. 10 (1970); see also 116 Cong. Rec. 21712

bate over the Act discloses that Congress was well aware of the extent to which the availability of preferential rates, and the political nature of postal rate-making in general, attracted lobbyists into the rate-setting process and invited the abuses that not infrequently result from their influence.⁶⁴ A major thrust of the postal reform effort therefore was to minimize this attraction of lobbyist influence by severely curtailing the broad discretion that had characterized prior ratesetting procedures and served to shield abuses of the system.⁶⁵

The two Houses advanced different approaches for solving these problems. The Senate passed a bill that would have abolished all rate preferences, phasing in the expected rate increases over five and ten year periods to cushion the impact of the elimination of

(June 12, 1970) (remarks of Sen. McGee) ("Except for first-class mail, no class of mail comes anywhere close, right now, to paying its fair share of the costs.").

⁶⁴ For instance, as Senator McGee noted:

"The committee believes that if Congress is to separate itself from periodic battles over rate adjustments, we should make the separation complete. We should get the Congress out of the clutches of the lobby list. To retain any ratemaking power is to insure that our halls will be filled with the representatives of special interest groups who will, as they always have, attempt to convince the Members of Congress that the world will truly come to an end if we raise the rate on their mail."

116 Cong. Rec. 21712 (June 26, 1970).

⁶⁵ Most of the money in the postal system comes from first class mail. A 100% increase in the rate for all second class mail would not produce as much revenue as a 5% increase in the first class rate. The temptation to resolve the financial problems of the post office by charging the lion's share of all operational costs to first class is strong; that's where the big money is. The necessity for preventing the imposition upon the only class of mail which the general public uses is one of the reasons why the Postal Rate Commission should be independent of operating management.

S. Rep. No. 91-912, 91st Cong., 2d Sess. 13 (1970).

preferential treatment.⁶⁶ The House Bill, on the other hand, would have written into law the preferences then existing by providing that "the preferential rates accorded these categories of mail will not be changed by Congress, unless the Congress fails to appropriate funds sufficient to cover the revenue foregone because of the rate preference."⁶⁷ Moreover, the two bills differed significantly in the guidelines they prescribed for distributing postal costs to set postal rates: while both proscribed discrimination,⁶⁸ the Senate Bill required a reasonable allocation of all costs, including institutional costs,⁶⁹ whereas the House Bill provided only that each class of service would bear "at least those costs demonstrably related to [it]."⁷⁰

These differences were subjected to conference bargaining. In exchange for the retention of enumerated preferences, the House accepted the Senate's standards for allocating costs.⁷¹ Moreover the standards of the Senate Bill, which in any event were more stringent than those proposed in the House Bill, were further strengthened at conference and expressly made applicable to all classes of mail (§ 3622(b)(3)) in-

⁶⁶ S. 3842, 91st Cong., 2d Sess. (1970), at § 3704(i); S. Rep. No. 91-912, 91st Cong., 2d Sess. 10-13 (1970); *see also* Cong. Rec. 21712-13 (June 26, 1970).

⁶⁷ H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 18 (1970); *see* H.R. 17070, 91st Cong., 2d Sess. (1970), at § 1202.

⁶⁸ *See* S. 3842, 91st Cong., 2d Sess. (1970), at §§ 101(c), 503(c); H.R. 17070, 91st Cong., 2d Sess. (1970), at § 401(c). *Compare* 39 U.S.C. §§ 101(d), 403(c).

⁶⁹ *See*, S. 3842, 91st Cong., 2d Sess. (1970), at § 3704(g)(3).

⁷⁰ H.R. 17070, 91st Cong., 2d Sess. (1970), at § 1201(c).

⁷¹ *See* H.R. Rep. 91-1363, 91st Cong., 2d Sess. 85-87 (1970); *see also* 1-864-65.

cluding the preferred classes (§ 3626). Subsection 3622(b)(3), which is the only 3622(b) ratemaking subsection which was not taken verbatim from the Senate Bill, was originally only a guideline that the Commission, in determining rates, consider "operating costs, the amount of overhead, and other institutional costs of the Postal Service properly assignable to each class of mail or type of mail service."⁷² But when it emerged from conference this guideline had become "the *requirement* that each class of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type."⁷³ See note 59 *supra*.

It is quite apparent from this history that the conference committee amendments to subsection (b)(3) were designed to reemphasize the severe limitations that the Act places upon the Service's ability to set rates other than in strict accord with cost-of-service principles. Prior to the Act the Service enjoyed broad discretion in the allocation of postal costs, a discretion which in the past had made the setting of postal rates susceptible to political bartering and the frequently abusive influence of lobbyist efforts. We are persuaded that the conference committee amendments, which apparently were insisted upon by the Senate conferees in exchange for the major concession of retaining certain preferential classes of mail, were intended to clarify the extreme degree to which the Act restricts that prior, and quite problematic, dis-

⁷² S. 3842, 91st Cong., 2d Sess. (1970), at § 3704(g)(3).

⁷³ 39 U.S.C. § 3622(b)(3) [emphasis added]. As we have previously noted, subsection 3622(b)(3) is the "most concrete" of the ratemaking guidelines contained in the Act. *American Publishers*, 157 U.S. App. D.C. at 406, 485 F.2d at 777.

cretion. In view of this it would be anomalous to construe subsection 3622(b)(3) as permitting a grudging use of cost-of-service principles which, by expanding the residuum of costs subject to discretionary allocation, simply preserves the potential for continuing the very same discriminatory treatment that the Act so clearly intended to remedy.

Subsection 3622(b)(3) provides, in short, that the Postal Rate Commission must first of all attribute to each mail class or postal service all postal costs which may reasonably be determined, through variability theory as well as through other reasonable inferences of causation, to be the consequence of providing the service. It must then distribute among the mail classes and services that significant portion of all remaining costs of the Postal Service that may reasonably⁷⁴ be assigned to each on the basis of best available cost-of-service estimates. The residuum of costs is subject to discretionary allocation in accord with the noncost factors set forth in the Act.

b. *Compliance with the Act.*—In deciding whether the Commission's adopted ratemaking approach complies with the requirements of the Act we are not unmindful that the scope of our review is limited. Absent a specific statutory command to the contrary our task is simply to ensure that the Commission has

⁷⁴ We emphasize that "reasonably" as used in subsection 3622(b)(3) in connection with assignable costs must be read against the overall purpose of the section, which is to maximize the use of cost-of-service principles throughout postal ratemaking. Simply put it means that all reasonable efforts must be made to assign unattributed costs to the various classes of mail and service by use of acceptable cost-of-service estimates rather than to allocate them discretionarily as residual costs.

followed proper procedures, that it has considered the relevant and excluded the irrelevant, and that its rate-making order has produced no arbitrary result.⁷⁵ As we said in *American Publishers*, however, we must also be assured that the Postal Service has not “flouted a statutory command.”⁷⁶

The overriding feature of this case is the express mandate of subsection 3622(b)(3) that all reasonable efforts be made to trace the cost consequences of providing each mail class or service and to allocate postal costs on that basis to the fullest extent possible. In specifically requiring that the Commission endeavor to maximize the use of cost-of-service principles, Congress deliberately went beyond the general ratemaking requirement that rates be fair and equitable.⁷⁷ It is the Commission’s duty therefore to respond faithfully and not grudgingly to this plain command of the statute, and it is equally our duty to carefully scrutinize responses to this particular aspect of the Act’s overall ratesetting scheme and to reject efforts that fail to comply with this special requirement⁷⁸—efforts which, in short, flout the express command of the Act.

(1) *Attribution*.—There is no contention in this case that cost variability is an invalid starting point

⁷⁵ *E.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *American Publishers*, 157 U.S. App. D.C. at 404, 485 F. 2d at 755 (Wyzanski, J.).

⁷⁶ 157 U.S. App. D.C. at 404, 485, F. 2d at 755 (Wyzanski, J.).

⁷⁷ That postal rates be established that are “fair and equitable” is both an underlying premise of the Act, *see* 39 U.S.C. § 101(d), and a specific noncost factor which may be considered in allocating residual costs, *see* 39 U.S.C. § 3622(b)(1).

⁷⁸ *See Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 589 (1945).

in the attribution of postal cost⁷⁹—all the parties before us employ it to some extent. The issue rather is whether the Commission’s reliance on cost variability, to the virtual exclusion of other considerations, is insufficiently responsive to the Act’s express concern for extended attribution.⁸⁰

Our task, of course, is not to prescribe an acceptable percentage level of attribution.⁸¹ Nor are we charged with selecting from among alternative approaches available to the Commission the one approach which we deem most responsive to the underlying purposes of the Act. We are an appellate court, not an agency possessed of developed expertise. We look to the design of the Commission’s approach not to substitute our judgment for that of the agency, but only to determine whether the Commission’s adopted method falls unconscionably short of the statutory requirements.

⁷⁹ *See generally J. Bonbright, Principles of Public Utility Rates* 337–68 (1961); *cf. New York v. United States*, 331 U.S. 284 (1947).

⁸⁰ *See* pp. 28–39 *supra*.

⁸¹ The following table is a comparison of attribution percentages achieved by the various parties:

ALJ	OOO	UPS	Commissioner Saponaro	USPS	PRC
70.6%	77.4%	83.6%	70.6%	45.1%	52.5%

See 1—888, 940.

The ALJ, given his special role, might properly have given great weight to a comparison between the seemingly low percentage achieved under the Commissioner’s approach and the much higher percentages generated by the alternative methodologies. He may in fact have determined implicitly that after five years of acquaintance with the Act, attribution of only 52.5% was simply not enough. *See* note 45 *supra*. But our role is quite different and our decision does not rest on any determination that a certain percentage level of attribution is dictated by subsection 3622(b)(3).

As noted above, the Commission acknowledges that presently incomplete data preclude full attribution under its cost variability approach.⁸² It insists, however, that utmost accuracy in the measurement of causation must prevail over all else.⁸³ In our view this allegiance to the goal of greatest possible accuracy fatally flaws the design of the Commission's adopted method since at present the Commission's goal may be obtained only by substantially disregarding the Act's express concern for extended attribution.

The Commission suggests, however, that it had no choice but to continue to rely on its cost variability methodology since each of the alternative approaches presented to it failed to meet the requirement that agency action be nonarbitrary and the product of reasoned decisionmaking.⁸⁴ We are unpersuaded. Attribution methods such as those used in the alternative approaches are not infrequently employed in agency ratemaking, *E.g.*, *Domestic Passenger-Fare Investigation, Phase 9-Fare Structure*, C.A.B., Order No. 74-3-82, Docket No. 21866-9 at 32 (March 18, 1974); *Domestic Service Mail Rate Investigation*, 47 C.A.B. 310, 312-14, 339 (1967); *Reopened Pan American Mail-Rate Case*, 35 C.A.B. 540, 546-47 (1962); *Area Rate Proceeding*, 34 F.P.C. 159, 192-93 (1965); *Atlantic Seaboard Corp.*, 11 F.P.C. 43, 56 (1952); *Mississippi River Fuel Corp.*, 4 F.P.C. 340, 353 (1945). Moreover, they have been upheld by the courts. See *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Colorado Interstate Gas Co. v. Federal Power Com-*

⁸² See note 35 *supra*.

⁸³ See pp. 20-21 *supra*.

⁸⁴ *E.g.*, *Greater Boston Television Corp. v. Federal Communications Commission*, 143 U.S. App. D.C. 383, 393, 444 F. 2d 841, 851 (1970), *cert. denied*, 403 U.S. 923 (1971).

mission, 324 U.S. 581 (1945); see also *Commonwealth of Pennsylvania and New York State Department of Transportation v. Interstate Commerce Commission*, — U.S. App. D.C. —, — F. 2d — (D.C. Cir., March 31, 1976); *Payne v. Washington Metropolitan Transit Comm'n*, 134 U.S. App. D.C. 321, 340-41, 415 F. 2d 901, 920-21 (1968).

To be sure, the use of average costs must be based on substantial evidence and reasoned findings. See, *e.g.*, *Baltimore & Ohio Railroad Co. v. Aberdeen & Rockfish Railroad Co.*, 393 U.S. 87 (1968). But these alternative approaches, which the Commission labels and tries to dismiss as merely "accounting methods of costing," may not be put aside simply by asserting that "different judgments can produce highly different allocations of common costs, and there is no rational basis to choose one allocation over another."⁸⁵ The mere fact that a different formulation of the same distribution keys would result in a different overall attribution does not necessarily render the methodology arbitrary. In fact, the same criticism can be made of a cost variability methodology. As the Commission itself noted, the longer the time span chosen, the greater the percentage of costs which may be attributed on that basis: "[I]f the inputs are viewed over the extreme long-run * * * attribution would reach 100 percent."⁸⁶

The point is that a ratemaking approach may not be disregarded simply because it lacks perfection;⁸⁷

⁸⁵ 1-596 (footnote omitted).

⁸⁶ 1-609.

⁸⁷ See *Commonwealth of Pennsylvania and New York State Department of Transportation v. Interstate Commerce Commission*, — U.S. App. D.C. —, — F. 2d — (D.C. Cir., March 31, 1976), slip op. at 11.

to be acceptable a methodology need only be reasoned, nonarbitrary and permissible under the statute. As Judge Wenner candidly and aptly observed in criticizing his own method, "[d]oubtless more refined methods and judgments will be developed in future cases as more facts are discovered; but a space and weight allocation for transportation is a sound and workable solution to the problem at this stage of postal rate regulation."⁸⁸ *Compare Commonwealth of Pennsylvania and New York State Department of Transportation v. Interstate Commerce Commission*, — U.S. App. D.C. —, — F. 2d — (D.C. Cir., Mar. 31, 1976); *Domestic Service Mail Rate Investigation, supra*, 47 C.A.B. at 317. The alternative approaches presented to the Commission seem plainly to have been reasonable efforts motivated by a concern for fuller attribution and designed simply to go beyond the inferences of causation presently derivable under a cost variability theory.⁸⁹ We are unpersuaded that the Commission may properly disregard them as unsupported in the record and irrational.⁹⁰

We conclude that in the circumstances of this case the Commission's almost exclusive reliance on a cost variability approach to attribution contravenes a primary purpose of subsection 3622(b)(3) and therefore fails to comply with the Act.⁹¹

⁸⁸ 1—6, (footnote omitted).

⁸⁹ See 1—878.

⁹⁰ See 1—585-86.

⁹¹ The Commission's attribution of "specific fixed costs," see note 32 *supra*, does not affect our holding. At least as presently implemented that modification to the Commission's reliance on cost variability is so minimal as to be insignificant when viewed against the statute's express concern for extended attribution.

(2) *Assignment*.—The Commission's value-of-service approach to assignment of unattributed costs also fails to comply with a plain requirement of the Act. The Commission clearly misreads the second part of subsection 3622(b)(3). It interprets the "reasonably assignable" costs provision of subsection (b)(3) as wholly unrelated to cost-of-service considerations and directed instead only to the judgmental distribution of unattributed costs on the basis of the noncost factors contained in section 3622(b) and especially the value-of-service consideration of subsection (b)(2).⁹² As we have explained, however, "reasonably assignable" costs must be allocated in accordance with cost-of-service principles, and it is only residual costs which are subject to discretionary distribution to give effect to the noncost factors.⁹³ We conclude that the Commission's present method for assigning unattributed costs proceeds from a faulty premise in contravention of the Act and therefore must be rejected.⁹⁴

⁹² This interpretation, although clearly wrong, is certainly understandable as a reaction to our preliminary assessment of subsection 3622(b)(3) in *American Publishers*. While our analysis in that case emphasized the special role that cost-of-service principles must play in postal ratemaking, it did not clearly expose the extent to which these principles infuse not only "attributable" costs but "reasonably assignable" costs as well.

⁹³ See pp. 28-39 *supra*.

⁹⁴ Even viewing the Commission's use of value-of-service in the more limited context as an approach for allocating only residual costs, *i.e.*, those costs permissibly subject to allocation-based non-cost considerations, there is serious doubt whether such an approach is authorized under the Act. First, under present circumstances, where even the Commission concedes that every class of mail is demand inelastic at current and reasonably foreseeable rates, see 1—640, it may be questioned whether the Commission is able to meet the requirement that value-of-service be employed

We wish to emphasize that our holding with regard both to attributable and assignable costs is narrow. Our duty in this case is not to prescribe any one methodology, and nothing we say here should be taken as approving in advance any particular approach. The selection of one approach from among acceptable alternatives is a matter for agency expertise. We hold only that in the circumstances of this case neither the Commission's reliance on cost variability as the key to attribution nor its use of demand theory as a premise for allocation of un-attributed costs complies with the Act because both plainly contravene in different ways the express statutory command that in setting postal rates every

only where *all* farepayers, even those discriminated against, are benefitted. See *Payne v. Washington Metropolitan Transit Comm'n*, 134 U.S. App. D.C. 321, 336-37, 415 F. 2d 901, 916-17 (1968). For an example of circumstances in which discriminatory, value-of-service pricing may "result in lower fares to the public as a whole," *id.* at 336, 415 F. 2d at 916 (footnote omitted), see *J. Bonbright, Principles of Public Utility Rates* 309 (1961); see also *id.* at 383.

Second, even if proper circumstances did prevail, *i.e.*, if at least one class of mail were demand elastic, it is doubtful whether the Commission could properly employ the inverse elasticity rule, as it apparently did here, as a mechanical device to take into account through a single formula *all* the noncost factors set forth in the Act. See 1-627. The Commission is required to exercise its discretion in fact, and under the terms of the Act this may necessitate that it give individual and specific consideration to each of the enumerated noncost factors even if after such consideration it properly decides not to vary from proportional markups on the basis of any particular factor. Compare *Payne v. Washington Metropolitan Transit Comm'n*, *supra*, 132 U.S. App. D.C. at 338-39, 415 F. 2d at 918-19.

reasonable effort be made to employ cost-of-service principles to the fullest extent possible.⁹⁵

III. Nos. 75-2227, 75-2228 AND No. 75-2238: THE ATCMU AND THE STATE OF MAINE CASES

The remaining cases involve the most recent rate-making proceeding (docket No. R76-1) and raise challenges, on procedural (ATCMU) and substantive (State of Maine) grounds, to the Postal Service's authority in the circumstances of this case to propose permanent increases in fees for special services and to authorize temporary postal rates to be in effect pending completion of Commission proceeding in docket no. R76-1.

At its September 4, 1975 Board meeting, immediately after the Governors issued the rate order contested in NAGCP, the Board convened and discussed the need for further increases in postal rates and fees. After reviewing the "general magnitude"⁹⁶ of the increases management deemed appropriate, the Board authorized the Postal Service to submit a request for

⁹⁵ Adapting to the requirements of subsection 3622(b)(3) should not prove too great a burden on the Commission. Obviously there is no bright line distinction between those costs properly attributable under extended inferences of causation and those properly assignable through best available cost-of-service estimates. But see note 59 *supra*. Of far greater importance than any definitive and categorical definition of "attributable" or "assignable" as used in subsection 3622(b)(3) is the explicit requirement that postal costs, however characterized, be allocated in accordance with cost-of-service principles to the fullest extent reasonably achievable. See also note 74 *supra*.

⁹⁶ Minutes of the September 4, 1975 Meeting of the Board of Governors of the United States Postal Service, at 3-5 [hereafter cited as "September 4 Minutes"].

postal rate increases with the Commission by September 19 and further authorized the Service unilaterally to increase "fees for various special services * * * after allowing a period for public notice and comment on the proposed increases."⁹⁷ On September 18, without obtaining Board review of the completed request, the Postal Service filed the rate request with the Commission.⁹⁸ Also pursuant to the Board's directive the Postal Service, on September 19, announced its intention to increase fees for various special services and solicited comments of interested parties.⁹⁹

On October 9, the Postal Service published notice that it would impose temporary rate increases on December 28, 1975, in substantially the same amounts as the requested permanent rates, unless by December 18 the Commission had transmitted its recommended decision to the Governors.¹⁰⁰ The proposed increases in fees for special services were scheduled to take effect on January 3, 1976.¹⁰¹

⁹⁷ *Id.* at 5.

⁹⁸ 40 Fed. Reg. 44044 (Sept. 24, 1975). On October 8, 1975, appellee Associated Third Class Mail Users filed an objection with the Commission asking the Commission to return the request to the Postal Service on grounds that the completed request was never reviewed or approved by the Board. The Commission dismissed this objection on October 21. Brief for Appellee Associated Third Class Mail Users, at 7.

⁹⁹ 40 Fed. Reg. 43233 (Sept. 19, 1975).

¹⁰⁰ 40 Fed. Reg. 4787 (Oct. 9, 1975).

¹⁰¹ While the notice published by the Postal Service did not specify a date when the proposed increases would be put into effect, a subsequent press release indicated plans to implement the increased in early November 1975. Memorandum of Points and Authorities of Plaintiff Associated Third Class Mail Users in Support of Motion for Preliminary Injunction, Appendix (Nos. 75-2227, 75-2228), at 28. Still later the Postal Service announced that the proposed increases would go into effect January 3, 1976. *Associated Third Class Mail Users v. United States Postal Service*, Civil No. 75-1809 (D.D.C. filed Dec. 16, 1975), Memorandum Opinion and Order, at 3 [hereafter cited as *ATCMU Opinion*].

On October 29 appellant State of Maine, representing itself and sixteen other states, filed a complaint in district court raising substantive arguments and seeking declaratory and injunctive relief to prevent the Postal Service from implementing the temporary rate increases. (No. 75-2238) Two days later appellee ATCMU filed suit seeking similar relief on procedural grounds against the proposed fees as well as the temporary rates.¹⁰² (Nos. 75-2227, 75-2228)

On November 7 the Board, noting the complaint filed by ATCMU, met and resolved that the Board action at the September 4 meeting was consistent with the Board's prior practice.¹⁰³ On December 16, however, the district court, in ruling on ATCMU's complaint, concluded that the Postal Service had not complied with the procedural requirements of 39 U.S.C. § 3601 *et seq.*,¹⁰⁴ as implemented through the Board's Operating Procedures. Accordingly, on the parties' cross motions for summary judgment, the Court, on December 16, entered judgment for appellee ATCMU and enjoined the Postal Service from putting the temporary rates into effect or from implementing the fee increases until it submitted to the Commission an appropriate request and otherwise complied with the requirements of section 3601 *et seq.* On the same day,

¹⁰² Appellee National Easter Seal Society for Crippled Children and Adults, after being granted leave to intervene as plaintiff, filed a complaint limited to the issue of fees.

¹⁰³ Minutes of the November 7, 1975 Meeting of the Board of Governors of the United States Postal Service, at 1-2 [hereafter cited as "November 7 Minutes"].

¹⁰⁴ Chapter 36, 39 U.S.C. § 3601 *et seq.*, sets forth the procedure of rate request, Commission hearing, recommended decision, and Governor's order. See discussion at text accompanying notes 8-15 *supra*.

in the State of Maine case, the district court denied appellant's motion for preliminary injunction, and on December 18, on appellant's unopposed motion, entered final judgment against State of Maine.¹⁰⁵

On December 19 the Board convened a special meeting to take action in response to the injunction entered in the ATCMU case. After reviewing the "specific rates and fees to be requested" as well as "full supporting data and documentation," the Board directed the Postal Service to submit appropriate requests to the Commission.¹⁰⁶ The rate request was resubmitted the same day; the request for changes in fees for special services was submitted January 5, 1976.

Appeals were taken from the district court judgments in both cases. In the ATCMU case appellant Postal Service moved this court for summary reversal or, alternatively, a stay of the court order pending appeal. At the same time appellant State of Maine sought an injunction of the increases pending appeal. On December 29, 1975, after hearing argument in both cases, we denied State of Maine's request for an injunction, denied the Postal Service's motion for summary reversal, but granted the Service's alternative motion for stay, limiting its effect to the temporary rates. As a result the Postal Service, on December 31, put the temporary rates, including the 13 cent first class rate, into effect. The fees for special services, however, remained subject to the district court injunction.

¹⁰⁵ The court treated the preliminary injunction hearing as a consolidated hearing on the merits. See Rule 65(a)(2), Fed. R. Civ. Pro.

¹⁰⁶ Minutes of the December 19, 1975 Meeting of the Board of Governors of the United States Postal Service, at 2-3 [hereafter cited as "December 19 Minutes"].

We will address each case in turn.

A. THE ATCMU CASE

On the merits,¹⁰⁷ we will address separately the two distinct issues presented in this case: first, whether

¹⁰⁷ The appeal need not be dismissed as moot. True, the district court injunction has expired by its own terms now that the 90 days required in section 3641 have elapsed since the Postal Service, in compliance with the terms of the order, resubmitted its rate request on December 19 and submitted an initial request for increases in fees for special services on January 5. However, it is well settled that "voluntary cessation of alleged illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W. T. Grant*, 345 U.S. 629, 635 (1953). The submissions of December 19 and January 5 were a direct and voluntary response to the district court order at issue in this case. And rather than there being "no reasonable expectation that the wrong will be repeated," *id.* at 633 (footnote omitted), the Postal Service's corrective action here clearly was taken under protest and in expectation of appeal. See *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 308 (1897). The "voluntary cessation of allegedly illegal conduct" exception to mootness thus applies here. See also *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974).

Moreover, given ATCMU's abiding and continuing interest in the setting of postal rates and fees that comply with the Act and the Postal Service's expressed view that the order here at issue was in error, there is "a reasonable expectation that the same complaining party [will] be subjected to the same action." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Yet, because an order such as this is by its nature short-lived, the dispute will evade review, or at least considered plenary review, unless the appeal is heard now. Therefore, the "capable of repetition, yet evading review" exception to mootness is also applicable here. *E.g.*, *Nebraska Press Ass'n. v. Stuart*, — U.S. —, 44 USLW 5149, 5151 (U.S., June 30, 1976); *Sosna v. Iowa*, 419 U.S. 393, 397-403 (1975); *Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *Golden Holiday Tours v. OAB*, — U.S. App. D.C. —, 531 F.2d 624, 626 (1976). See also note 21 *supra*.

the Postal Service is authorized unilaterally to establish fees for special services, and secondly, whether the Postal Service's September 18 request for postal rate increases was validly submitted to the Commission.

1. Proposed Changes in Fees for Special Services

The first issue turns on whether the fees for the kinds of special services at issue in this case¹⁰⁸ are "fees for postal services" within the meaning of 39 U.S.C. § 3622. If so, then they fall within the Commission's jurisdiction and as such may be changed only in compliance with the Chapter 36 procedure of request, Commission hearing, recommended decision, and Governors' order. Appellees contend, and the district court held, that these services would be considered postal services in ordinary parlance and that the fees set for these services have substantial public effect.¹⁰⁹ The court concluded therefore that under the most reasonable interpretation of Chapter 36 of the Act these fees are subject to the Commission's jurisdiction. Appellants argue, however, that the Act meant to continue the distinction drawn under prior postal legislation between postal and special services and that under this distinction the Postal Service retains the authority unilaterally to change the fees for the services here involved, which it denominates special

¹⁰⁸ The services in question include: (1) The furnishing of mail list corrections; (2) the privilege of prepayment of postage without stamps; (3) the forwarding or returning of undeliverable mail; (4) the registry of mail; (5) the insurance of mail; (6) the provision of COD mail; (7) the certification of mail; (8) the securing of a signed receipt upon the delivery of mail and the returning of it to the sender; (9) special delivery; (10) the special handling of mail; (11) the provision of money orders. See 40 Fed. Reg. 43233-34 (Sept. 19, 1975).

¹⁰⁹ *ATCMU Opinion*, at 11-13.

nonpostal services. Without adopting all the reasoning of the district court on this point, we find its interpretation of the Act persuasive and its holding legally correct and adequately supported.¹¹⁰

Section 3622 of the Act establishes the Commission's jurisdiction over "changes in a rate or rates of postage or in a *fee or fees for postal services*."¹¹¹ Other sections of the Act indicate that use of the phrase "fees for postal services" was not inadvertent and was intended to mean something quite apart from

¹¹⁰ Ordinarily, of course, a reviewing court must give great deference to the interpretation given a statute by the agency charged with its administration, *e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and should not substitute its judgment for that of the agency if the agency's construction is reasonable, *e.g.*, *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975). Both the district court and this Court have been informed by this principle in analyzing the interpretation of the Act offered by the Postal Service and in rejecting it, after giving the Service due deference, as a construction too "curious" and "narrow" to prevail over a commonsense reading of the statute. See note 113 *infra* and accompanying text. We note at the outset, however, a peculiarity of this case which lends further support to our conclusion. The Postal Rate Commission, which at the very least is a co-participant with the Postal Service in the administration of the Act's ratesetting process, took the somewhat unusual step in this case of filing with the district court its own memorandum of law on the fees for special services issue. In that memorandum the Commission advances an interpretation of the Act quite at odds with that of the Service and fully in accord with the conclusion reached by the district court. See Memorandum of Law by the Postal Rate Commission, at 1, in Appendix at 121 ("the Commission's official position on the [fees] issue * * * has historically been opposed to that of the * * * Postal Service"). The district court, in short, without expressly stating so might simply have deferred to a long-held and reasonable interpretation given the statute by the very agency whose jurisdiction is at issue.

¹¹¹ 30 U.S.C. § 3622(a) [emphasis added].

"rates of postage." For instance, where a particular section applies only to rates for postage, the phrase "fees for postal services" is omitted.¹¹² Since the Act provides no specific definition of "postal services," however, we must construe its meaning within the purposes of the Act, looking to legislative history where the words themselves, read plainly, are inadequate. *See* note 110 *supra*.

Giving "postal services" a plain meaning, all of the services here at issue may reasonably be so classified. With one possible exception, each clearly involves an aspect in the posting, handling and delivery of mail matter. *See* note 108 *supra*. As for the one possible exception—money orders—it is undisputed that the great majority of these are sent through the mail and that therefore the provision of money orders may itself reasonably be viewed as intimately a part of postal services. Appellants, however, offer a somewhat curious construction of the phrase that would exclude all of these services. They would define postal services to include only a few items such as bulk mailings and use of business reply mail, for which flat fees are charged, and Saturday delivery of mail and home delivery of mail in rural areas, for which no fee at present is charged. They would exclude in general apparently all services not intimately connected with the actual delivery of mail.

Appellants fail to provide, however, any reasonable basis for their restrictive construction or any reason whatsoever why it should prevail over a commonsense interpretation.¹¹³ Moreover, section 3621, which pro-

¹¹² *See* 39 U.S.C. §§ 3626, 3627, 3683.

¹¹³ We are reminded on numerous occasions that "the plain, obvious and rational meaning of a statute is always to be preferred

vides that "[p]ostal rates and fees shall be fair and equitable," applies specifically to "rates of postage and fees for postal services."¹¹⁴ Applying appellants' construction to section 3621 would lead to the improbable conclusion that while Congress was concerned that fees for such comparatively limited services as bulk mailing be fair and equitable, it was not at the same time concerned that fees for the more generally used services of special delivery and certified mail also be fair and equitable.¹¹⁵ Absent a well reasoned explanation, and none has been provided to us, we cannot accept a construction that necessitates such curious results.

In sum, we agree with the district court that a plain reading is the proper reading of section 3622: "postal services" as used there is a generic term and was meant to include all the special services here at issue.

Appellants' arguments based on prior legislation do not convince us to the contrary. It is true that prior to the Act the fees here involved were denominated "fees for special service" and were prescribed by the Postmaster General,¹¹⁶ while postal rates and fees were set

to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925), *quoted in Chandler v. Roudebush*, — U.S. —, 44 USLW 4709, 4712 (U.S., June 1, 1976). *See also* note 110 *supra*.

¹¹⁴ 39 U.S.C. § 3621.

¹¹⁵ Nor can appellant convincingly argue that "fees for postal services" means something different in 39 U.S.C. § 3622 (establishing the Commission's jurisdiction) than in 39 U.S.C. § 3621 (establishing the Governor's authority to fix rates). *See, e.g., Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427 (1932).

¹¹⁶ *See* 39 U.S.C. §§ 507, 5009, 5010 (1964 ed.); 39 U.S.C. § 4106 (1964 ed., Supp. V).

by Congress.¹¹⁷ The argument that this distinction was preserved in the Act, however, ignores the fundamental change Congress intended in creating the Postal Rate Commission. More than this the argument rests on a wholly unconvincing construction of scattered sections of the Act.

Appellants argue, for instance, that section 4(a) of the Act, by "transferr[ing] to the United States Postal Service all the functions, powers, and duties of the Post Office Department and the Postmaster General of the Post Office Department,"¹¹⁸ evidences an intent to preserve the distinction and to maintain in the Postal Service unilateral authority to establish fees for special services. But section 4(a) was clearly only a transitional provision designed to assure that there would be no lapse in the rendering of services as the old Post Office Department became the new Postal Service. It taxes credibility to believe that Congress, after devoting an entire chapter of the Act to defining the powers and duties of the Postal Service, would then use such an obscure device to transfer significant additional power.

Reliance on 39 U.S.C. § 404(b) is equally without merit. Section 404(b) vests the Postal Service with power "to provide, establish, change, or abolish special[,] nonpostal or similar services."¹¹⁹ Appellants argue that this, as well as the absence in section 3622 of any specific mention of "special services," establishes its power unilaterally to set fees for those services. But the power to establish, change

¹¹⁷ See, e.g., 39 U.S.C. §§ 4253, 4452 (1964 ed.).

¹¹⁸ 39 U.S.C. § 201 (note).

¹¹⁹ It is generally agreed that the absence of a comma between "special" and "nonpostal" was inadvertent. *ATCMU Opinion*, at 15 n. 2.

or abolish certain services does not necessarily include the additional and distinct power to set the fees for those services. And the doctrine that a general powers provision like section 404(b) may not ordinarily override a specific provision such as section 3622 further undermines appellants' position. *Cf. Maiatico v. United States*, 112 U.S. App. D.C. 295, 301, 302 F.2d 880, 886 (1962).

But most of all, any reasonable examination of the purposes of the Act discloses Congress' implicit design that the distinct functions of service provision and rate adjustment be divided between the Postal Service and the Rate Commission. The expertise of the Postal Service supposedly is in management, and its authority therefore reasonably extends to basic decisions pertaining to the provision of special, nonpostal and other services. The Postal Rate Commission, however, was created specifically to oversee the ratemaking process. Its expertise is in the setting of rates and fees that are fair and equitable, and its authority therefore reasonably extends to all aspects of such decisions, including review of budget estimates, allocation of postal costs, establishment of rates for postage, *and*, it would seem plainly, the setting of fees for those special services which management decides should be provided.

Finally, legislative history clearly belies the contention that Congress intended to continue the prior authority vested in the Postmaster General to establish fees for special services unilaterally. That prior authority was contained in former section 507. But section 507 was specifically repealed and no analogous provision enacted in its place. Moreover, this repeal clearly was not inadvertent since provisions dealing specifically with section 507 authority were included

in the postal reform bill which passed the House¹²⁰ but were deleted from the bill finally enacted.

In short, a plain reading of the Act, its legislative history, and the purposes implicit in the creation of an independent Postal Rate Commission whose members "shall be chosen on the basis of their professional qualifications," 39 U.S.C. § 3601, all support the district court's conclusion that the Commission's jurisdiction extends to all the fees for special services involved in this case. We therefore affirm the district court order as it pertains to the fees involved in this case.

2. Request for Changes in Postal Rates and Fees

The remaining issue—whether the Postal Service's request for changes in postal rates was valid when submitted on September 18—turns on quite different considerations. On this issue the jurisdiction of the Commission is conceded. The only question is whether the request, as submitted September 18 or as affected by the Board action taken November 7, met all applicable requirements for proper submission. The district court reasoned that under the Act and the Board's own regulations "the Board must have before it for its consideration at the time it approves the request, the specific rates and fees to be requested."¹²¹ In granting appellee the injunctive relief requested, the court concluded that since the specific rates and fees were not presented to the Board prior to September 18, when the Postal Service submitted the request to the Commission, temporary rates based

¹²⁰ H.R. 17070, 91st Cong., 2d Sess.; see also H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 46 (1970) (section 507 specifically rescinded).

¹²¹ *ATCMU Opinion*, at 7.

upon that request could not lawfully be implemented.¹²² Appellants' contrary arguments do not convince us that the district court's order must be reversed.

Under the Act only the Board has the authority and the power to make requests for recommended decisions on changes in postal rates and fees, which requests must be based on the determination that such changes would be in the public interest and in accordance with the policies of the Act.¹²³ At the time in question here the submission of rate requests was governed by certain Operating Procedures adopted by the Board.¹²⁴ Subparagraph eight of those Procedures enumerates as one matter specifically "reserved for decision by the Board of Governors":

Requests to the Postal Rate Commission for recommended decisions on postal rates and mail classification, and action upon such recommended decisions.¹²⁵

Read plainly the meaning of this specifically reserved authority is clear: the Postal Service must obtain the Board's approval of the request it proposes to submit to the Commission. Moreover, absent a clear and authoritative indication to the contrary the reasonable interpretation of this provision is that it is the request itself, not some preliminary study or work-

¹²² *Id.* at 10.

¹²³ See 39 U.S.C. § 202(a), 404(2), 3622(a).

¹²⁴ See 39 C.F.R. § 211.2 (1975).

¹²⁵ Board of Governors of the United States Postal Service, Operating Procedures (December 1971), at 3-4 [hereafter cited as Operating Procedures]. The Act generally permits the Board to delegate the authority vested in it to the Postmaster General, see 39 U.S.C. § 402, and the Board has delegated some of its authority, see 39 C.F.R. § 3.9 (1975). Subparagraph eight is a specific reservation from that delegation.

ing paper, that must be submitted for prior Board approval.

Appellants contend, however, that under subparagraph eight the only decision specifically reserved is the threshold determination whether to submit any request at all and that once that decision is made the Service is free to submit a request without first presenting the Board with the specifics of the rate changes it intends to propose or the data in support thereof. An examination of the Operating Procedures as a whole belies appellants' contention.¹²⁶

A primary purpose behind adoption of the Procedures was to insure that the Board "obtains the

¹²⁶ We recognize that the Postal Service's interpretation of subparagraph eight is entitled to some deference at least so long as it is reasonable and has been followed with some consistency. *See, e.g., Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see generally* 1 K. Davis, *Administrative Law Treatise* §§ 5.03-5.06 (1958 ed. and Supp. 1970). As explained at pp. 60-61 below, however, the Postal Service's interpretation, to say the least, places a curious construction on seemingly plain words, is difficult to square with the express purpose of the Procedures, and causes conflict among otherwise harmonious provisions. *See Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *see also* note 113 *supra*. And there is an even more serious problem with a construction of subparagraph eight under which all that need be approved in advance is the general magnitude of proposed increases. Like the post hoc interpretation given by the Board at its November 7 meeting, the Service's interpretation is significantly at variance with the meaning that has attached to the Operating Procedures by virtue of the Board's longstanding and consistent practice of approving the submission of a rate request only after reviewing the specific rates that management intends to propose to the Commission. *See* pp. 62-63 *infra*. In the presence of such a variance from previously consistent interpretation, and especially where the more recent construction is offered in the midst of litigation over the administrative rules in question, the amount of deference due the agency's interpretation diminishes substantially. *Morton v. Ruiz*, *supra*.

data" upon which to base those decisions "of sufficient importance, in the judgment of the Board, to require Board action."¹²⁷ Two considerations are persuasive evidence that the threshold determination whether to submit any request at all is not such an "important" decision, whereas approval of management's finalized proposal is. For one, the Act itself devalues that threshold decision by requiring that a request be submitted whenever postal expenses substantially exceed postal income.¹²⁸ More than this, the Operating Procedures provide separately that the Board need not initially decide but need only "review, and approve as appropriate," management's determination that there is a "need for rate increases or decreases," a determination which in effect controls the threshold decision whether a request must be submitted.¹²⁹ Unless this separate provision is simply redundant—and the Procedures appear too carefully constructed to support that inference—subparagraph eight must reserve for the Board something other than simply that threshold decision. In light of the underlying purpose of the Procedures, *i.e.*, to assure the Board the data necessary for decision, the only reasonable interpretation is the very one that a plain reading suggests: prior to submission the Board must review and approve the request itself, including the specific changes proposed by management and the supporting data.

It is clear, moreover, that under this interpretation the presentation made at the September 4 Board meeting fell substantially short of the requirements of

¹²⁷ *See* Operating Procedures, at 2.

¹²⁸ *See* 39 U.S.C. §§ 3621-22.

¹²⁹ Operating Procedures, at 7.

subparagraph eight. Indisputably, at the time of that meeting the process of preparing a rate request "was still incomplete."¹³⁰ Indeed, the Board's instructions to management were "that the Postal Service should complete the process of refining its proposed filing with the Rate Commission."¹³¹ And in fact, one day after the Board meeting a Postal Service press release announced that "[t]he exact amounts of the increases to be requested have not been finally determined."¹³²

We conclude that on the record properly before us the September 4 presentation failed to comply with the plain requirements of the Operating Procedures.¹³³

The action taken by the Board at its November 7 meeting does not affect our conclusion. At that meeting, convened specifically "because litigation involving interpretation of the Operating Procedures had been initiated," the Board did not review any data other than that available September 4. Instead, it discussed whether the September 18 submission was consistent

¹³⁰ And there is no evidence that the Board reconvened to review the completed rate request prior to its submission on September 18.

¹³¹ September 4 Minutes, at 4-5.

¹³² United States Postal Service General News Release, September 5, 1975.

¹³³ The Postal Service argues, however, that despite the clear implications of the minutes of the Board meeting and the press release, the Board did have before it on September 4, in the form of a display chart, the specifics of the very rate request to be submitted to the Commission. That chart, however, is not a part of the public record of the September 4 proceedings before the Board, and appellants did not even offer it into evidence in the district court. Brief for the Appellants, at 8 n.2. It has never been made available to appellees. Brief for Appellee ATCMU, at 32-33. Accordingly, the chart is not properly before us and will not be considered on this appeal, whatever its implication. See *Thomson v. Gaskill*, 315 U.S. 442 (1942); *Drake v. Finance Corp. of Louisiana*, 119 F.2d 588 (5th Cir. 1941).

with its interpretation of the Operating Procedures and with the Board's prior practice, and it "unanimously agreed that the presentation, discussion, and Board actions at the September 4 meeting, in regard to the proposed request to the Postal Rate Commission, fully satisfied the requirements of the pertinent provision of the Operating Procedures."¹³⁴

Despite the presumptions generally surrounding administrative action, the deference due an agency's interpretation of its own regulations will depend at least somewhat on the degree to which it is well reasoned and consistent with prior interpretations and action. *E.g.*, *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); see generally, 1 K. Davis *Administrative Law Treatise*, §§ 5.03-5.06 (1958 ed and Supp. 1970). Where the words in question, as here, do not require any special competence for their interpretation, a court may well be equally or better qualified to interpret them than is the agency, at least where the agency's interpretation is offered in the wake of litigation which turns on those very regulations.¹³⁵ See *Morton v. Ruiz*, *supra*; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *State of Delaware v. Bender*, 370 F. Supp. 1193, 1204 (D. Del. 1974); cf. *McKart v. United States*, 395 U.S. 185, 197-98 (1969).

The interpretation offered here—that the Board's September 4 approval of the "general magnitude" of the changes to be proposed in management's not then finalized request fulfilled the Board's obligation under the specific reservation of subparagraph eight—seems hardly reasonable and consistent with a plain

¹³⁴ November 7 Minutes, at 1-2.

¹³⁵ Compare *Fleming v. Van Der Loo*, 82 U.S. App. D.C. 74, 80, 160, F. 2d 906, 912 (1947), with *Udall v. Tallman*, 380 U.S. 1, 17 (1965).

reading of the Operating Procedures as discussed earlier. See *D.C. Federation of Civic Associations v. Volpe*, 316 F. Supp. 754, 784-85 (D.D.C. 1970), *reversed on other grounds*, 148 U.S. App. D.C. 207, 459 F. 2d 1231 (1972), *cert. denied*, 405 U.S. 1030 (1972). Nor is it consistent with prior practice. To the contrary, minutes of previous Board meetings indicate that both at the time of the first submitted request which predated adoption of the Operating Procedures, and the second request, which postdated their adoption, the Board reviewed and approved the very request that management proposed to submit to the Commission.¹³⁶

We conclude that the Board's action at the November 7 meeting is not a controlling interpretation of the Operating Procedures and does not require variance from the interpretation discussed above.¹³⁷ We hold that the September 4 presentation was inadequate under the Board's then existing rules and that

¹³⁶ See Minutes of the Meeting of the Board of Governors of the U.S. Postal Service, on January 26, 1971; Minutes of the Meeting of the Board of Governors of the U.S. Postal Service, on September 10, 1973.

¹³⁷ The Board attempted to buttress its offered interpretation by including in the minutes statements of "members of the Board who were among the original appointees to the Board" as to what the Board's "intent" was in adopting the Operating Procedures. Such after the fact explanations, however, are entitled to very little weight. A Board, like a legislature, speaks through the final action taken and no member, outside the Board, is empowered to speak with authority for the body. To accord such evidence substantial weight would encourage the transfer of the debate from the boardroom to the court. See *National School of Aeronautics v. United States*, 142 F. Supp. 933, 938 (Court of Claims 1956).

therefore the September 18 request based upon it was defective.¹³⁸

¹³⁸ It does not avail appellants to argue that the Operating Procedures, as interpreted above, might impose restrictions on the Board's conduct beyond those imposed by the Act. Since the Board promulgated the rules to govern its proceedings and since those proceedings have substantial public impact, the rules, until properly changed, must be scrupulously observed even if more binding than the Act. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Borough of Lansdale v. Federal Power Commission*, 161 U.S. App. D.C. 185, 494 F. 2d 1104 (1974); *Pacific Molasses Co. v. Federal Trade Commission*, 356 F. 2d 386 (5th Cir. 1966).

Indeed, appellees argue with some persuasiveness that public policy and the Act itself, quite apart from any rules of practice adopted by the Board, mandate the Board's thorough involvement in the process of submitting rate requests and thus by their own force would require reversal of the Board's action in approving management's tentative proposal since that proposal included only the "general magnitude" of increases to be recommended to the Commission. They note that the Governors (who predominate on the Board), unlike the Commission, are "chosen to represent the public interest generally," 39 U.S.C. § 202(a), and that it is far from settled whether the Postal Service must provide a hearing prior to implementation of temporary rates, see *Mail Advertising Corp. of America v. USPS*, 148 U.S. App. D.C. 158, 159, 459 F. 2d 1182, 1183 (1972). They conclude from this that the Act therefore requires intimate Board involvement in the request submission process as the only practicable avenue for public input into the important function of setting temporary rates, basing this conclusion on three primary considerations: (1) that it is the Board "which exercises the power of the Postal Service to set temporary rates," *id.*; (2) that it is the request for new permanent rates which in practical and legal effect "sets" temporary rates, see 39 U.S.C. § 3641; and (3) that at least under present circumstances "temporary" rates are vitally significant since they have been in effect for a longer period of time than their supposedly "permanent"

Finally, we are unpersuaded that the district court abused its discretion in enjoining implementation of temporary rates until the Postal Service submitted a nondefective request and otherwise met the requirements of 39 U.S.C. § 3641. Contrary to the Postal Service's position, it is not the submission of *any* request but the submission of a *valid* request that activates the provisions of 39 U.S.C. § 3641. Otherwise the carefully constructed limitations of 39 U.S.C. § 3641(c) could be easily subverted.

Moreover, appellants' second argument—that the district court should have remanded the request and that 39 U.S.C. § 3628 proscribes enjoining temporary rates during such remand—is equally without merit. Remand was not mandated, and even if the court in its discretion had chosen that course, injunction pending resubmission would not have been statutorily foreclosed. Section 3628 applies to judicial review of decisions of the Governors, not to the decision of the Board here challenged. *Mail Advertising Corp. of America v. United States Postal Service*, 148 U.S.

counterparts. Because the Postal Service's action was in violation of its governing rules of practice, however, we need not reach this issue and therefore express no final determination of it.

Finally, we are unconvinced that the November 7 Board action retroactively validated the otherwise defective September 18 submission. Whether or not an agency has power first to modify its rules to permit ratification of prior action, and then to apply its modified rules to action taken prior to the modification, *see, e.g., United States ex rel. Accardi v. Shaughnessy, supra*, the Board at its November 7 meeting simply did not attempt any such retroactive modification. The Board quite plainly sought instead to portray its regulations as unchanged since their adoption and to characterize the September 4 presentation as in compliance therewith. Our holding rejects that characterization.

App. D.C 158, 159, 459 Fed. 1182, 1183 (1972). Different considerations govern rates sought to be implemented temporarily prior to public hearing than govern the situation for which section 3628 was designed, *i.e.*, implementation of permanent rate changes after full Commission proceedings. The district court's discretion to order injunctive relief is broad. Appellants have shown no clear abuse. We therefore affirm the district court order as it pertains to rates.

B. THE STATE OF MAINE CASE

In the final case before us the states, as appellant, contend that the Postal Service's action in implementing the temporary rate increases at issue here, regardless of compliance with procedural requirements, is substantively defective and that the district court erred in denying the requested injunctive relief. Since appellant's arguments parallel those which we already explored thoroughly in NAGCP,¹³⁹ we need not examine them here in detail. Briefly, appellant asserts that the Postal Service's request, upon which the temporary rates rest, once again evidences a too restrictive methodology for attribution of costs, thereby threatening illegal cross-subsidization; that the request also demonstrates continued employment of the inverse elasticity rule for allocating unattributed costs, thereby resulting in rates that unduly and unreasonably discriminate against the users of first class mail; and that the Postal Service's progress toward correction of these defects is too slow, if it exists at all. The district court denied appellant's request for injunctive relief, concluding that the rate-making philosophy and methods adopted by the

¹³⁹ See discussion in Part IIB *supra*.

Commission were "simply not invalid as a matter of law" and that in its instant request the Postal Service applied those standards fairly and diligently. We affirm.¹⁴⁰

At the outset we note that our review is quite narrow. The district court has broad discretion to deny injunctive relief.¹⁴¹ Unless appellant carries the heavy burden of demonstrating an abuse of discretion, the order must be affirmed. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 633-34 (1953).

Appellant correctly asserts that in this most recent request the Postal Service relies on ratemaking principles that differ very little from those which we criticized in *American Publishers* and which we today hold deficient in NAGCP. The instant rate request evidences that attributable costs are still defined as variable costs, and that allocation of unattributed costs is still dependent on demand factors.¹⁴² At the same time,

¹⁴⁰ The fact that the Governors' order of July 7, 1976, terminated the temporary 13 cent rates as of July 18 does not moot this appeal. *See* note 21 *supra*.

¹⁴¹ On December 16, 1975, the district court issued an order denying appellant's motion for a preliminary injunction. In response to appellant's uncontested motion, the court, on December 18, treated the hearing on preliminary injunction as a consolidated hearing on the merits, rendered judgment for appellees, and dismissed appellant's suit.

¹⁴² In the instant rate request the Postal Service proposes to attribute approximately 55.6% and to assign approximately 44.4% of total costs which since the time of docket no. R74-1 have risen an additional \$2 billion and now total approximately \$14 billion. The district court seems quite correct in observing that "the pace of the Service's advances * * * resemble[s] that of the tortoise." *State of Maine, et al. v. United States Postal Service*, Civil No. 75-1782 (D.D.C., filed December 16, 1975), Opinion, at 19 [hereafter cited as *State of Maine Opinion*].

however, there is discernable progress toward improving the data base in an apparent effort to reconcile the Postal Service's concern for accurate measurement of causation with the Act's requirement of extended attribution. For instance, in order to develop data useful in attributing nonvariable costs incurred as a consequence of providing more than one but not all classes or types of service, the Postal Service has listed in its present request those fixed costs which benefit a restricted number of classes.¹⁴³

Such programs, however, would not seem to remedy all the defects in the cost variability approach that we have analyzed in NAGCP. Nor does it answer our questions regarding the use of demand factors and, in particular, reliance on the inverse elasticity rule in allocating unattributed costs. But these are issues to be faced squarely only on review of the Governors' order in response to the Commission's recommended decision in docket no. R76-1.

The special but limited role that the Postal Service is expected to play in the development of postal ratemaking methodology properly affects our review of challenges to the substantive merit of submitted rate requests. Unlike in *American Publishers* and the NAGCP cases where we reviewed a ratemaking methodology adopted after full hearings by a Commission which is charged with the duty, and imbued with the expertise, to establish postal ratemaking principles, here we are called upon to examine only the initial step in the process: a request submitted by the Postal Service, as approved by the Board, which understandably is based upon the methodology previously adopted by the Commission.

¹⁴³ *See id.* at 13, 19.

The Postal Service, after all, does not possess the expertise of the Commission and its request is prepared without the benefit of full hearings. Indeed, it is not required under the Act even to accompany its request with suggestions for the particular rate adjustments it deems suitable.¹⁴⁴ In short, we are wise at this point not to insist that the Postal Service innovate when it prepares a request to submit to the Commission. True, the Postal Service is in a "unique position" to formulate a "fundamental approach" to ratemaking,¹⁴⁵ but it is the Commission which, in the end, carries the primary obligation in ratemaking.

We conclude that the district court correctly held that the Postal Service's primary duty is to apply the Commission's ratemaking philosophy and methods fairly and diligently in preparing its rate request.¹⁴⁶ There is ample support in the record for the court's conclusion that the Service did not apply the Commission's principles incorrectly, arbitrarily, with bias, or with inadequate evidentiary support. In sum, we hold that appellant simply has not carried the heavy burden of demonstrating that the district court abused its discretion in refusing to grant appellant the injunctive relief it sought.

MACKINNON, *Circuit Judge*, concurring: In the main I concur in the court's opinion. However, to prevent a possible misreading of the opinion's import with respect to Nos. 75-1856, 75-1857, the National Association of Greeting Card Publishers (NAGCP) case, I add a few words to clarify my views on certain aspects of the court's holding.

¹⁴⁴ 39 U.S.C. § 3622(a).

¹⁴⁵ *American Publishers*, 157 U.S. App. D.C. at 408, 485 F. 2d at 779.

¹⁴⁶ *State of Maine Opinion*, at 11-12.

The court's analysis of section 3622(b), which "sets forth the cost and noncost considerations that the Commission must take into account in setting rates," could lead to a construction of the Act which to my mind overly emphasizes the cost allocation considerations of subsection (b)(3), so as to leave the remaining seven subsections, the so-called noncost factors, practically devoid of any real meaning or application.

The Per Curiam opinion overemphasizes the extent to which "reasonably assignable" costs, in addition to "attributable" costs, must be allocated in accordance with cost-of-service principles,² and further overemphasizes the extent to which the use of cost-of-service principles must be maximized throughout the process of postal ratesetting.³ As a result it is only the "residuum" of costs which, according to the Per Curiam opinion, may "be used to give effect to the noncost factors expressly set forth in the Act."⁴

My concern is that the opinion not be read as requiring that practically all postal costs be attributed or assigned to some class of mail or type of service on the "direct and indirect" cost-of-service principles contained in subsection (b)(3), with the result that only an insignificant residuum of costs are assigned in accordance with the seven remaining statutory considerations. In its entirety the controlling section reads as follows:

(b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each

¹ Per Curiam op. at 18.

² *Id.* at 31 & n. 59.

³ *Id.* at 34.

⁴ *Id.*

class of mail or type of service in accordance with the policies of this title and the following factors:

(1) the establishment and maintenance of a fair and equitable schedule;

(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services; and

(8) such other factors as the Commission deems appropriate.

39 U.S.C. § 3622(b), (84 Stat. 760). A mere reading of this section indicates that Congress intended to vest a substantial discretion in the Commission to recom-

mend rates and fees that are "fair and equitable," that relate to the value of the postal service provided to users, and that consider competition, the effect upon the general public and business interests, the ease of handling certain mailable matter, the simplicity of the entire rate structure and such factors as the Commission might deem appropriate. But if the Per Curiam opinion regarding section (b) (3) is to be construed as requiring that the attribution and assignment of practically all costs be on a strained cost-of-service basis, these discretionary factors may never have any substantial effect. How could the Commission recommend a rate for a particular class of mail that it found would be "fair and equitable" and would not adversely affect legitimate business interests if practically all the relevant costs were required to be attributed or assigned according to an almost absolute cost-of-service straight jacket? To make the seven discretionary standards meaningful Congress must have intended that there be some substantial volume of costs that are available for assignment.

The proper interpretation of section (b) (3) in the scheme of the Act and the entire section 3622, is at the heart of this problem. To repeat, that subsection provides:

(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type.

39 U.S.C. § 3622(b)(3). The first admonition of this subsection is that "each class * * * bear the direct and indirect *postal* costs attributable [thereto] * * *" [emphasis added]. This deals only with direct and in-

direct postal costs, and it is my view that the attack the opinion makes on "cost variability" as a method of "identifying [these] attributable costs" for direct and indirect expenditures (Per Curiam op. at 30) overlooks the degree of approval that Congress gave to such method when the House Committee stated in its Report that

the *attributable* provision establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that *vary* over the short term in response to changes in volume of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved.

H.R. REP. NO. 91-1363, 91st Cong., 2d Sess. 87 (1970) [emphasis added]. I would allow the Commission somewhat more leeway in this aspect of their duties to conform to the congressional intent expressed in this quoted portion of the Committee Report.

Next, the Per Curiam opinion states that:

A plain reading [of section 3622(b)(3)] also clearly suggests that the other costs of the Postal Service that are to be "reasonably assigned" must also be allocated on *cost-of-service principles*. That is, after the process of extended attribution is complete, a portion of the remaining costs are to be assigned to the various mail classes and postal services to the extent that it can reasonably be determined or estimated that certain classes of service may account for particular costs.

Per Curiam op. at 31 [emphasis added]. While the Per Curiam opinion recognizes that "Congress did not intend that *all* postal costs be either attributable or assigned," (Per Curiam op. at 33) a strict application of the principles it announces may reduce the amount of

remaining costs subject to "reasonable assignment" to such a minor quantity that the application of the other seven standards will be deprived of any substantial impact.

With this background, the opinion attacks the "Commission's value-of-service approach to assignment of *unattributed* costs [asserting that it] * * * fails to comply with the *plain* requirement of the Act * * * [holding that] it is only residual costs which are subject to discretionary distribution to give effect to non-cost factors." (Per Curiam op. at 44-45) (emphasis added).

This contention results from overemphasis on the single word "requirement" and on the forefront of subsection (b)(3), to the exclusion of the remainder of that subsection and of the other seven subsections and does not even correctly interpret subsection (b)(3). The second provision of subsection (b)(3) states:

* * * plus that portion of all other costs of the Postal Service reasonably assignable to such class or type.

This clearly states that a "portion of all other costs of the Postal Service" may be "*reasonably assigned*," and nothing would be more reasonable than that such costs which were not "direct or *indirect* costs" of specific classes or types should be assigned according to the remaining seven subsections. Yet the Per Curiam decision expresses a strong opinion that such costs "*must* be allocated in accordance with cost-of-service principles." (Per Curiam op. at 45; *cf. id.* at 31). This is an impermissible intrusion into the plain language of the statute, and if subsection (b)(3) is given a "*plain* reading," it does not require the emphasis on "cost-of-service principles." The Per Curiam claims this result

on the basis of the legislative history,⁵ but such intent, if it exists, is very obscure, and legislative history is not properly reached because the statute plainly states that the postal rates recommendations "shall" also reflect the seven *other* factors enumerated in section 3622. In claiming reliance on legislative history the Per Curiam opinion tries to make too much out of too little. The word "shall" at the forepart of section 3622 is just as mandatory as the word "requirement," in the same section, if not more so, since it applies to the entire section—but the Per Curiam opinion overemphasizes the latter and refuses to recognize the former.

The effect of the Per Curiam construction is to read subsection (b)(3) as though it provided:

* * * [T]he Commission shall make a recommended decision * * * in accordance with * * * (3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type *on cost-of-service principles.*"

[matter in italics supplied]. If Congress had intended a "portion of all other costs of the postal service" to be assigned to particular classes or types on such cost-of-service principles it would have so stated in the Act. It did as much in the forepart of subsection (b)(3) when it provided that "each class * * * or type * * * bear the direct and indirect postal costs attributable [thereto]." And in providing for the attribution of all "indirect postal costs" as well as "direct * * * postal costs," Congress pretty well exhausted the postal costs that could properly be assigned on *cost-of-service* principles.

⁵ Per Curiam op. at 37-39, n. 74.

To construe subsection (b)(3), as the Per Curiam would, to overemphasize cost-of-service assignment, would practically require the Commission to lean over backwards in assigning as many other costs as possible on the same basis as the "direct and indirect postal costs." But Congress did not so enact. Instead, Congress provided only that a "portion of *all* other costs of the Postal Service [shall be] *reasonably* assignable to such class or type * * *." [emphasis added]. That is an entirely different standard from one expressing a requirement, or even a preference, that such costs "must" be assigned on a cost-of-service basis. "Reasonable" assignments and "must" assignments are partially self-contradictory. If the costs were substantial that were subject to this alleged cost-of-service basis of assignment, practically no costs whatsoever would be left to be "reasonably assigned" in accordance with the other seven standards in subsection (b), *i.e.*, (1) fairness and equity, (2) the value of the mail service, (3) the effect upon the general public and business users, (4) available alternative service, (5) cost reducing preparation of mail, (6) simplicity of rate structure and (7) other appropriate factors. And, as stated above, unless these seven factors are to be practically meaningless a substantial amount of costs must be available for reasonable assignment pursuant thereto. These seven factors embody major principles that substantially affect the public interest and vital segments of our economy, and they should be fully reflected in the rates.

Accordingly, it is my interpretation of subsection (b)(3) that while some of the other costs may be reasonably assigned on cost-of-service principles, Congress did not intend by the present statute that the

amount of costs so assigned would be so large as to prevent the Commission from meaningfully incorporating the remaining standards into the postal rate structure.

In my opinion any interpretation of the Act which overemphasizes the role of the forepart of subsection (b)(3), so that the other seven factors are in effect read out of existence, must be rejected as inconsistent with this express requirement of the Act that the Commission's recommended rate decision "shall" be in accordance with the policies of the Act and all the policies stated in the ensuing eight subsections of section 3622. The Per Curiam opinion as I read it does not necessitate any such interpretation.⁶ Therefore, with the exception of these views I concur in the court's opinion.

⁶ The court properly conceives its scope of review as quite limited and therefore expressly declines to "approv[e] in advance any particular approach" to postal ratemaking. Per Curiam op. at 46. Indeed, it may be that the ALJ erred as much on the side of expansive use, or possibly misuse, of cost-of-service principles as the Commission erred on the side of overly restrictive use. That is, some of the costs "attributed" by the ALJ, as additions to those attributable costs identified by the Commission through the use of a cost variability approach, may not be acceptably assignable even as "best estimates" of the cost consequences of providing a particular class of mail or type of mail service. See Per Curiam op. at 39 & n.74. The point is that at this stage we can no more say with confidence, and the opinion expressly does not say, that 70.6% (the ALJ's figure) is acceptable as not too high a level of attribution/assignment than we can say that 52.5% (the Commission's figure) is "simply not enough" attribution. See Per Curiam op. at 41, n.81.

APPENDIX B

United States Court of Appeals for the District of
Columbia Circuit

No. 75-2227 & 75-2228—September Term, 1976

Civil 75-1809

ASSOCIATED THIRD CLASS MAIL USERS
NATIONAL EASTER SEAL SOCIETY FOR CRIPPLED
CHILDREN AND ADULTS

v.

UNITED STATES POSTAL SERVICE, APPELLANT
POSTAL RATE COMMISSION, ET AL.

No. 75-2238—Civil 75-1782

STATE OF MAINE, ET AL., APPELLANT

v.

UNITED STATES POSTAL SERVICE, APPELLEE

*Appeals From the United States District Court for
the District of Columbia*

Before: BAZELON, Chief Judge, ROBINSON AND MAC-
KINNON, Circuit Judges.

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

(77A)

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from in these causes are hereby affirmed, in accordance with the opinion of this Court filed this date.

Per Curiam For the Court.

GEORGE A. FISHER, *Clerk*.

Date: December 28, 1976.

Opinion Per Curiam.

Concurring opinion filed by Circuit Judge MacKinnon.

APPENDIX C

United States Court of Appeals for the District of
Columbia Circuit

No. 75-2227—SEPTEMBER TERM, 1976.

Civil Action #75-1809

ASSOCIATED THIRD CLASS MAIL USERS
NATIONAL EASTER SEAL SOCIETY FOR CRIPPLED
CHILDREN AND ADULTS

v.

UNITED STATES POSTAL SERVICE, APPELLANT
POSTAL RATE COMMISSION, ET AL.

No. 75-2228

[United States Court of Appeals for the District of
Columbia Circuit, Filed April 21, 1977, George A.
Fisher]

Civil Action #75-1809

ASSOCIATED THIRD CLASS MAIL USERS
NATIONAL EASTER SEAL SOCIETY FOR CRIPPLED
CHILDREN AND ADULTS

v.

UNITED STATES POSTAL SERVICE
POSTAL RATE COMMISSION, ET AL., APPELLANTS

Before: BAZELON, Chief Judge; ROBINSON and
MacKINNON, Circuit Judges

(79A)

ORDER

Upon consideration of the petition for rehearing filed by appellant United States Postal Service, and of the responses thereto filed by appellee National Easter Seal Society for Crippled Children and Adults, and of appellee Associated Third Class Mail Users, and of the letter filed pursuant to Rule 8(g) of the General Rules of this Court by appellant United States Postal Service advising of additional authorities, it is **ORDERED** by the Court that appellant's petition for rehearing is denied.

For the Court:

Per Curiam.
GEORGE A. FISHER,
Clerk.

APPENDIX D

In the United States District Court for the District
of Columbia

ASSOCIATED THIRD CLASS MAIL USERS, PLAINTIFF, and
NATIONAL EASTER SEAL SOCIETY FOR CRIPPLED CHILD-
REN AND ADULTS, INTERVENOR,

v.

UNITED STATES POSTAL SERVICE, ET AL., DEFENDANTS.

[Filed December 16, 1975, James F. Davey, Clerk]

Civil Action No. 75-1809

Memorandum Opinion and Order

The parties in the above entitled matter are presently before the Court on cross-motions for summary judgment. They have submitted memoranda in support of their respective motions and have orally presented their positions in open court.

Plaintiff Associated Third Class Mail Users (hereafter "ATCMU") is a nonprofit organization, organized under the corporation laws of the District of Columbia for the purpose of improving the use of third-class mail for its members. Plaintiff-intervenor National Easter Seal Society for Crippled Children and Adults (hereafter "Easter Seals") is a nonprofit corporation organized under the laws of the state of Ohio for the purpose of providing a program of direct service, education and research for physically handicapped persons.

Defendant United States Postal Service (hereafter "Postal Service") is an independent establishment of the executive branch of the government, created by statute by Congress to provide postal services for the United States of America. Defendant Postal Rate Commission (hereafter "Rate Commission") is an independent establishment of the executive branch of the government of the United States, created by act of Congress. Defendants Clyde S. DuPont (Chairman), Paul A. Miltich, Kieran O'Doherty, Frank P. Saponaro, and Carlos C. Villarreal are members of the Rate Commission.

MATERIAL FACTS

On September 4, 1975, a meeting of the Board of Governors of the Postal Service (hereafter "Board") was held. At that meeting the Board was advised by the Assistant Postmasters for Finance and for Rates and Classification that projections of revenues and expenses for fiscal year 1976 showed that the Postal Service would be faced with a deficit if postal rates remained at the current levels.

The Board was further advised that extensive preparation was necessary to permit a filing of a rate request with the Rate Commission in accordance with the Commission's rules of practice; that such preparation had been going on for several months; that significant adjustments would have to be made to what had already been prepared as a result of the latest guidelines issued in the Rate Commission's opinion of August 28, 1975; but that the general outline of what the postal management considered to be appropriate adjustments to the various postal rates was reasonably clear. Specific dollar amounts for the proposed increases for the various classes of mail were

not presented to the Board at that meeting. After this presentation by postal officials, the Board directed the Postal Service to complete its preparation of the request and file it with the Rate Commission no later than September 19, 1975. The Postal Service submitted the request for proposed rate increases with the Rate Commission on September 18, 1975.

Also at the meeting of September 4, 1975, the Board discussed the level of fees for various other services, and agreed that the Postal Service should increase these fees as soon as reasonably possible. Based upon this determination by the Board, on September 19, 1975, the Postal Service published a notice in the Federal Register, soliciting comments on proposed increases in fees for these services.

Subsequent to the meeting of the Board on September 4, 1975, the Postal Service announced that it would place into effect new "temporary" postal rate increases as of December 28, 1975, and new fees for various other services to become effective on January 3, 1976.

PLAINTIFF'S CONTENTIONS

Plaintiff ATCMU challenges the proposed imposition of the new "temporary" rates, contending that such imposition would be illegal. ATCMU alleges that the purported "request" of the Board filed with the Rate Commission on September 18, 1975, is invalid since the Board failed to approve the request as required by the Postal Reorganization Act and the Rules of the Board. Since, plaintiff contends, a valid request having been made to the Commission is a condition precedent to the imposition of temporary changes in postal rates, and there being no valid requests before the Commission at this time, the imposition of temporary rates would be illegal.

Plaintiffs ATCMU and Easter Seals assert that the proposed January 3, 1976 imposition of increased fees for various other services would also be illegal. Plaintiffs contend that it is illegal for the Postal Service to increase fees for special and other services without complying with the procedures set out in Chapter 36 of the Postal Reorganization Act. In particular, plaintiffs state that the Postal Service may not increase such fees without first requesting a recommended decision from the Rate Commission. Since it is uncontested that the Postal Service did not request such a recommendation in this case, plaintiffs argue that the new increases may not legally be imposed.

CONCLUSIONS OF LAW

I. TEMPORARY POSTAL RATE INCREASES

The first issue, the legality of the temporary rates scheduled to go into effect on December 28, 1975, centers on plaintiff's contention that the rate request submitted by the Postal Service to the Rate Commission on September 18, 1975, was invalid.

It is clear to the Court from a careful reading of the Act that both the authority and the power to request recommendations for changes in postal rates lies with the Board of Governors, and no one else.

Section 202 of the Act, entitled "Board of Governors" states, "(a) The *exercise* of the power of the Postal Service shall be directed by the Board of Governors" (emphasis added). This section takes on more specific relevance to the instant case when read with Chapter 4 of the Act which delineates the general authority of the Postal Service which the

Board is charged with directing. Specifically Section § 404. Specific powers

Without limitation on the generality of its powers, the Postal Service shall have the following specific powers, among others:

* * * * *

(2) to prescribe, in accordance with this title, the amount of postage and the manner in which it is to be paid; * * *.

In Chapter 36 of the Act we find even more specific language indicating that the Board is charged with the duty to direct the rate-making process and to request recommended decisions from the Rate Commission:

§ 3621. Authority to fix rates and classes

Except as otherwise provided, the Governors are authorized to establish reasonable and equitable rates of postage * * * in accordance with the provisions of this chapter. Postal rates and fees shall be reasonable and equitable and sufficient to enable the Postal Service under honest, efficient and economical management to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States * * *.

* * * * *

§ 3622. Rate and fees

(a) From time to time the Postal Service shall request the Postal Rate Commission to submit a recommended decision on changes in a rate or rates of postage . . . if the Postal Service determines that such changes would be

in the public interest and in accordance with the policies of this title. The Postal Service may submit such suggestions for rate adjustments as it deems suitable.

Thus, reading these sections of the Act in relation to each other, §§ 202, 404(2), 3621 and 3622(a), it is apparent that, absent a proper delegation of its authority to another party or parties in accordance with the provisions of the statute, that the Board, in directing the exercise of power of the Postal Service, has the sole authority to request a recommended decision from the Rate Commission.

Although there is a general delegation of authority provided in the Act, § 402, which provides that the Board may delegate the authority vested in it to the Postmaster General, it is clear that such a delegation is not applicable in the instant case. The Board, although delegating some power to the Postmaster General through its By-Laws (39 C.F.R. § 3.9), have certainly withheld any delegation of its authority to request recommended decisions by the Commission. The Operating Procedures adopted by the Board provide, in pertinent part:

Decisions of the Board

The procedures establish a system under which the Board will make those decisions which by statute the Board, or the presidentially-appointed Governors, are required to make and under which the Board will make any additional decisions and approve such actions recommended by postal management as are of sufficient importance in the judgment of the Board, to require Board action.

II. Actions Requiring Decisions by the Board of Governors.

The following matters are reserved for decision by the Board of Governors:

* * * * *

8. Requests to the Postal Rate Commission for recommended decisions on postal rates and mail classification, and action upon such recommended decisions (by the Governors, 39 U.S.C. § 3625). (Exhibit A, Defendant's Statement of Facts As To Which There Is No Genuine Issue)

From this analysis it is obvious that the Board, and they alone, retain the authority to request recommended decisions from the Rate Commission. There is nothing in either the statute or the Board's rules which relieves it of this responsibility.

This being the case, the critical question is whether the Board made a proper, valid, and considered request of the Rate Commission in its submission of September 18, 1975.

Plaintiff contends that the presentation made to the Board by the postal management on September 4, 1975, was so vague that the Board could not reasonably exercise an informed judgment concerning the proposed size and allocation of the proposed rate increase. Defendant simply responds that the presentation was sufficient to satisfy the statutory requirements.

It is uncontested, as stated in defendant's statement of material facts as to which there is no genuine issue, that the specific proposed increases for the various classes of mail were not submitted to the Board at that presentation. Also, it is clear that the supporting data and documentation for the proposed increases was not before the Board; that it was not complete and that "significant adjustments" would have to be made in that portion already prepared

to bring the filing into line with the guidelines announced by the Rate Commission in its opinion of August 28, 1975 (issued only seven days prior to the meeting of the Board), particularly in regard to cost attributions to the several categories of mail. What was placed before the Board was a "general outline of what *postal management* considered to be appropriate adjustments to the various postal rates" and the "general magnitude of increases in revenue which *management deemed necessary and appropriate* for each of the principal categories of mail" (Defendants' Statement of Material Facts As To Which There Is No Genuine Issue, pp. 3, 4 emphasis added). On oral argument, counsel for defendants confirmed that this is an accurate representation of the presentation made to the Board on September 4, 1975.

What the Board approved then was a "request" based upon a presentation of what the postal management considered "necessary and appropriate" without specific proposed rates and absent the supporting data which would be submitted to the Rate Commission upon completion.

It is the opinion of this Court that, in order for the Board to make a valid request under § 3622 of the Act, the Board must have before it for its consideration at the time it approves the request, the specific rates and fees to be requested, together with supporting data and documentation. To find otherwise would be to permit the Board to evade its statutory duty under the Act.

At several points in the Act, Congress reiterates the postal policy and the obligation of the Governors to assure that postal rates will be established on a "fair and equitable" basis and in the "public interest." (See §§ 101(d), 403 (a) and (c), 3621, and 3622.)

More specifically, Congress states in Section 3622 that " * * * the Postal Service shall request the Postal Rate Commission to submit a recommended decision on a change in a rate or rates of postage * * * if the Postal Service *determines* that such changes would be" (1) "in the public interest and" (2) "in accordance with the policies of this title." (39 U.S.C. § 3622, emphasis added).

Clearly, "request," as used in this statute demands that the Board make a *determination*, an informed decision, as to whether the proposed rate or rates are (1) in the public interest and (2) in accordance with the policies of the Act, specifically with § 101(d) of the "Postal Policy," which requires that "postal rates be established * * * on a fair and equitable basis."

It would be ludicrous to think that the Board could make an intelligent, informed determination of whether the proposed rates are fair and equitable and in the public interest without having before it information as to the specific rates to be requested for each category of mail, together with their supporting data.

To hold, as defendant suggests, that it is sufficient for the Board to review and approve the "general magnitude" of increases or the "general outline" of what postal management considers to be appropriate adjustments for a request to be valid, would be to free the Board of a decision which it is statutorily obligated to make. And it is a settled principle of Administrative Law that "those legally responsible for a decision must in fact make it, * * *" *KFC National Management Corp. v. N.L.R.B.*, 497 F. 2d 298, 304 (2d Cir. 1974).

Since, in the opinion of this Court, it is necessary for the Board to have the specific proposed rates be-

fore it together with supporting data when approving a request for a recommended decision of the Rate Commission, and since these items were not before the Board when it approved the request on September 4, 1975, the request submitted September 18, 1975, which is presently before the Rate Commission is invalid and may not properly be considered by the Rate Commission.

This having been decided, it is necessary to turn to the question of the legality of the temporary rates presently scheduled to take effect on December 28, 1975.

Section 3641 of the Act gives the Postal Service the power to place new, temporary rates into effect pending Rate Commission action on a request for new permanent rates:

§ 3641. Temporary changes in rates and classes

(a) If the Postal Rate Commission does not transmit to the Governors within 90 days after the Postal Service has submitted * * * to the Commission a request for a recommended decision on a change in rates of postage, * * * the Postal Service, upon 10 days' notice in the Federal Register, may place into effect temporary changes in rates of postage * * * it considers appropriate to carry out the provisions of this title.

There is no question that the power of the Postal Service to place temporary rates into effect is vested in the Board "since the Board of Governors exercises the power of the Postal Service to set temporary rates. (See 39 U.S.C. §§ 102, 202, 3641 (1970))." *Mail Advertising Corporation of America, Inc., et al. v. U.S. Postal Service*, 459 F. 2d 1182, 1183 (D.C. Cir. 1970).

As a practical matter, the imposition of "temporary" rates has the result of placing into effect rates

which are equal to the requested new permanent rates pending before the Rate Commission. As experienced by the only two other requests for recommended decisions which have been submitted to the Rate Commission since the passage of the Act in 1970, many months normally pass between the submission of the request and the final approval of new permanent rates.¹ This being the case, the imposition of temporary rates is a serious matter and one which must be carefully considered by the Board.

In permitting the Postal Service to place these temporary rates into effect, the Act requires that they be predicated upon a valid request for recommended decision having been submitted to the Rate Commission. Section 3641(c) reads:

(c) A rate of postage for a class of mail * * * under a temporary change under this section may not exceed the lesser of (1) the rate or fee requested for such class * * *, or (2) a rate or fee which is more than one-third greater than the permanent rate or fee in effect for that class * * * at the time a permanent change in the rate * * * is requested under section 3622 of this title. [Emphasis added.]

By limiting the temporary rate in this way, Congress insured that the temporary rates could be no higher than those requested and determined to be fair and equitable and in the public interest by the Board under § 3622.

Thus, the Act demands that a valid request must be before the Rate Commission before temporary rates

¹ In the first case, which began in 1971, 14 months passed between the imposition of temporary rates and the final approval of new permanent rates. And, in the second case, which began in 1973, 18 months elapsed.

may be imposed. Absent this prerequisite, the imposition of temporary rates would be illegal. This Court having decided that there is no *valid* request for a recommended decision presently before the Rate Commission, the imposition of temporary rates on December 28, 1975, would be clearly improper, and the defendants are hereby enjoined from doing so.

II. INCREASES IN CERTAIN OTHER CHARGES

The Postal Service has announced that it intends to increase charges for certain other services on January 3, 1976, and contends that it need not submit requests for recommended decisions to the Postal Rate Commission for changes in the fees for such services. Plaintiffs ATCMU and Easter Seals argue that any increase in the fees for these services would be illegal since changes in such fees are subject to provisions of §§ 3622, 3624 and 3625 of the Act. The services in question here include:

- (1) the furnishing of mail list corrections;
- (2) the privilege of prepayment of postage without stamps;
- (3) the forwarding or returning of undeliverable mail;
- (4) the registry of mail;
- (5) the insurance of mail;
- (6) the provision of COD mail;
- (7) the certification of mail;
- (8) the securing of a signed receipt upon the delivery of mail and the returning of it to the sender;
- (9) special delivery;
- (10) the special handling of mail;
- (11) the provision of money orders.

It is clear that nearly all of these other services are very closely related to the delivery of mail. The single possible exception is the selling of money orders, since they can be used equally as well without being delivered by mail. But it does seem that the vast majority of money orders sold at post offices are actually sent by mail. Therefore, it appears safe to say that all of these services would be considered "postal services" in ordinary parlance.

It is also clear that the fees set for these services have substantial public effect. Collectively, these services presently account for \$403 million annually in revenues; if the increases go into effect, the services are projected to bring in a total of \$490 million in revenues a year. In contrast, second-class mailers presently account for substantially less revenue—\$295 million a year. Evidence of the impact of these increases on individual consumers is less precise. Intervenor Easter Seals has indicated, however, that the proposed increase in the fees for mailing list corrections alone would cost it an additional \$200,000 a year. And it is even likely that the proposed increase in the fees for money orders would have a substantial impact on some who cannot readily find a cheaper substitute.

The issue posed is whether the Postal Reorganization Act of 1970 requires that changes in the fees for these services be subject to the scrutiny of a Postal Rate Commission proceeding, as provided in Chapter 36 of the Act. That Chapter provides that the Postal Rate Commission must hold full and adjudicatory hearings governed by 5 U.S.C. §§ 556 and 557 upon a request submitted by the Postal Service for a recommended decision of a change in rates or fees. ATCMU, Easter Seals, the Postal Rate Commission and the

Comptroller General all argue that the Act does make changes in these fees subject to Postal Rate Commission jurisdiction. The Postal Service, on the other hand, asserts that the Act gives it exclusive authority to increase these fees, subject only to the general rule making provisions of 5 U.S.C. § 553 (1970).

This Court finds a substantial indication of Congressional intent in the responsibilities given to the Postal Service and the Postal Rate Commission under the statute. The management of the Postal Service is in the hands of the Board of Governors. This group is structured much like the board of directors of a large corporation: it consists of the Postmaster General, the Deputy Postmaster General, and nine persons appointed by the President who serve, much like their counterparts in private industry, on a part-time basis. These nine "governors" unquestionably bring to their positions a wealth of experience in business generally, and no doubt represent as well as they can the public interest as they see it. But lacking formal hearing procedures they cannot be fully aware of the problems of the many groups or classes of consumers who may be affected by all of the proposed increases at issue here.

The Postal Rate Commission, on the other hand, consists of five persons employed full-time and selected by the President on the basis of their expertise in economics, pricing policy, and related subjects. Their actions on requests for recommended decisions are taken only after adjudicatory hearings. *See* 39 U.S.C. §§ 3624(a), 3661(c) (1970). It seems at the outset, then, that Congress intended, by its creation of the Rate Commission, that changes in fees such as these, which would likely have a substantial impact on size-

able and diverse groups in society, be tested by the full procedures provided in a Postal Rate Commission proceeding to determine the need for the increase and the practicability of less onerous alternatives.

The Postal Service asserts, however, that Congress did not intend to subject these services to the requirements of Chapter 36. It argues that the services at issue were not of sufficient importance to justify the additional costs that an adjudicatory proceeding under 5 U.S.C. §§ 556 and 557 would entail as compared to those of a rule-making proceeding under 5 U.S.C. § 553. It points out, as evidence of this intent, the fact that in prior legislation dealing with the Postal Service, the Postmaster General had authority to change the fees here in question without seeking authorization from Congress. *See* 39 U.S.C. §§ 507, 5009, 5010 (1964 ed.); 39 U.S.C. § 4106 (1964 ed., Supp. V).

It appears to the Court that this argument is without merit. It totally ignores the significance of the changes produced by the Act. Prior to the Act, the Rate Commission did not exist. In the Postal Rate Commission, Congress created an independent body with the necessary expertise and procedures, which is willing and able to take up the study of these increases. Nor can the Postal Service claim that the submitting of requests for recommended decisions to the Rate Commission would unduly limit its control over these fees; for, under Chapter 36, the Postal Service would be permitted, with slight limitation to make increases on a "temporary" basis, 90 days after sending a request to the Commission.

A closer analysis of the statute itself supports this conclusion.

The crucial passage upon which this issue turns appears in 39 U.S.C. § 3622(a) (1970). There the Act provides that:

[f]rom time to time the Postal Service shall request the Postal Rate Commission to submit a recommended decision on *changes in a rate or rates of postage or in a fee or fees for postal services* * * *. [Emphasis added.]

The Postal Service seeks very limited interpretation of the phrase "fee or fees for postal services" arguing that it does not refer to the fees for services in question here, but only to such charges as the annual \$30 fee that bulk mailers must pay for the privilege of using that rate, or the fee for the privilege of using business reply mail.

ATCMU, Easter Seals, the Rate Commission and the Comptroller General do not deny that these fees cited by the Postal Service are included in "fee or fees for postal services." They simply argue that, in addition, this phrase includes the fees for the other services in question here as well. As indicated above, this interpretation appears to accord quite well with the common meaning of the term "postal services."

The Postal Service, in attempting to limit the scope of the phrase "fee or fees for postal services," cites two other provisions of the Act to support its construction. First, it refers to § 4(a) of the Act, 39 U.S.C. § 201 note (1970), which states:

[t]here are hereby transferred to the United States Postal Service all the functions, powers and duties of the Post Office Department and the Postmaster General of the Post Office Department * * *.

The Postal Service argues that by this provision Congress intended to transfer to the Postal Service

the power the Postmaster General had previously to change unilaterally the fees on the services at issue here. The Court has already discussed above why it finds very little helpful to the Postal Service's position in the fact that the Postmaster General had the power in prior legislation. In addition, since Congress spent one entire chapter, Chapter 4 of the Act, delineating the powers and duties of the Postal Service under the new system, this Court thinks it highly unlikely that Congress would use such an obscure device for transferring additional power to the Postal Service. Rather, it is obvious that the provision was intended simply to insure the orderly transfer of power and duty.

Secondly, the Postal Service points to 39 U.S.C. § 404(6) to support its interpretation of the phrase "fee or fees for postal services." Here it finds its strongest argument.

Section 404(6) gives the Postal Service the power "to provide, establish, change, or abolish special[,] nonpostal or other similar services."² The terms "special" and "other similar services" clearly encompass the services at issue here.³ And it may be conceded that the power to "change" these services includes the power to increase the fees for them. But

² It is generally agreed that the absence of a comma between "special" and "nonpostal" was inadvertent.

³ It is not certain exactly what "nonpostal" refers to. Likely it encompasses such activities as selling United States savings bonds for the Treasury, maintaining a country-wide information service on civil-service examinations for all government positions, and conducting examinations for the Civil Service Commission. Letter from Comptroller General of the United States Elmer Staats to Chairman of the Committee on Post Office and Civil Service David N. Henderson, at 3-4 (October 28, 1975). Clearly, however, it does not refer to any of the services at issue here.

this does not get the Postal Service very far. For any increases in these fees may still be subject to review by the Postal Rate Commission under § 3622. On this point, the Postal Service argues that, since this power is not specifically made subject to the Postal Rate Commission's jurisdiction, it is clear that Congress intended that it not be. It argues that this omission is especially significant, since § 3621 gives the governors of the Postal Service the power to establish "reasonable and equitable rates of postage and fees for postal services *in accordance with the provisions of this Chapter* [giving jurisdiction to the Postal Rate Commission]." [Emphasis added.]

Another possible explanation for the omission—and perhaps a more reasonable one—is that Congress simply thought it unnecessary to put it in. But even if it be conceded that § 404(6) gives some credence to the Postal Service's position, this Court thinks that § 3661 provides an effective counterweight. That section deals with changes in the "nature of postal services which will generally affect service on a nationwide or substantially nationwide basis." It is highly improbable in this Court's view, that Congress would devote a whole section to the kinds of "postal services" that the Postal Service is arguing are the sole subject of that term—for example, the \$30 annual fee for bulk mailers and the fee for the privilege of using business reply mail. And it is difficult to believe that Congress would seek to distinguish between changes in those services that would have a nationwide impact and those that would not. Rather, it is much more reasonable to conclude that the term "postal services" was meant to embrace also those special and other services which are the subject of this litigation.

In conclusion, a careful analysis of the statute leads this Court to find that the Postal Rate Commission has jurisdiction over changes in the fees for the services at issue here. Therefore, the Court holds that the Postal Service cannot increase its fees for these services until it has complied with the provisions of sections 3622, 3624, and 3625 of Chapter 36 of the Act. The Postal Service is hereby enjoined from placing into effect the increased charges for such services on January 3, 1976.

ORDER

Accordingly it is by the Court this 16th day of December, 1975,

ORDERED that the plaintiff's motions for summary judgment be, and the same hereby are, granted; and it is

FURTHER ORDERED:

1. That since there is no valid request presently before the Postal Rate Commission for a recommended decision on postal rates, defendants may not legally set or put into effect temporary increases in postal rates until a legal request is made and the other statutory requirements of Chapter 36 of the Act are met.

2. That defendant Postal Service may not legally set or put into effect increased fees as they have proposed in 40 Fed. Reg. 43233-34 (Sept. 19, 1975) unless and until they submit such proposed adjustments to the Postal Rate Commission for a recommended decision and follow the procedures prescribed in Chapter 36 of the Act.

JOHN J. SIRICA,
United States District Judge.

APPENDIX E

UNITED STATES POSTAL SERVICE,
THE BOARD OF GOVERNORS,
Washington, D.C.

MINUTES

A meeting of the Board of Governors of the United States Postal Service was held at Postal Service Headquarters, L'Enfant Plaza West, Washington, D.C. on September 4, 1975, commencing at 9:10 a.m. The following members were present:

Benjamin F. Bailar
Charles H. Coddling
Robert Earl Holding
William A. Irvine
Crocker Nevin
Hayes Robertson
M. A. Wright.

The following was absent:

Andrew D. Holt.

Mr. Coddling offered a brief prayer, following which the Board reviewed the minutes of the meeting held on August 5, 1975, and approved them in all respects.

Mr. Bailar advised the members that he had appointed Mr. Applegate as Assistant Postmaster General for Customer Services and intended to appoint Mr. Conway as Senior Assistant Postmaster General for Employee and Labor Relations, appropriate salary adjustments for Mr. Applegate and Mr. Conway having been approved by the Board at the previous meeting. Mr. Bailar also advised the Board that he

(100A)

had decided to appoint Mr. John Doran as Executive Assistant to the Postmaster General and, in accordance with its Operating Procedures, the Board approved Mr. Bailar's recommendation for an appropriate salary adjustment for Mr. Doran.

Mr. Wright then brought up the recommended decision of the Postal Rate Commission on Changes in Postal Rates which the Commission had transmitted to the Governors on August 28, 1975, Mr. Bailar absenting himself from the meeting for the consideration of this matter. (Copies of the Rate Commission's recommended decision had been furnished the Governors in advance of the meeting.) The Governors reviewed their statutory options under the Postal Reorganization Act (39 U.S.C. § 3625) and their Postal Rate Decision of June, 1972, in considerable detail and then extensively discussed the Commission's recommended decision. After generally agreeing that the recommended decision should be approved to the extent that the Rate Commission has jurisdiction to recommend changes in rates of postage and fees for postal services, the Governors undertook a line-by-line review of a draft "Decision of the Governors", agreed on various changes in the draft, and then unanimously agreed to the "Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Services" which is attached hereto and incorporated herein.

Mr. Bailar then rejoined the meeting and the Board determined that the rates of postage and fees for postal services that were ordered to be placed into effect by the Decision of the Governors should become effective on September 14, 1975, commencing at 12:01 A.M. Accordingly, the Board adopted Resolution No.

75-6, "Effective Date of New Rates of Postage and Fees for Postal Services," as attached hereto and incorporated herein.

The members then discussed the appointment of a Deputy Postmaster General. Following a full discussion, upon motion duly made, seconded, and unanimously carried, the Board then adopted Resolution No. 75-7, "Appointment and Compensation of Deputy Postmaster General," as annexed hereto and incorporated herein. Mr. Bolger then joined the meeting as Deputy Postmaster General and a member of the Board.

Mr. Nicholson and Mr. Eden joined the meeting and the members discussed the necessity for the Postal Service requesting the Postal Rate Commission for a recommended decision on further changes in postal rates at the earliest practicable time in view of the very substantial financial deficits that the Postal Service would continue to incur unless adjustments were made in the rates approved earlier in the meeting. Without adjustment in those rates, the deficit for FY 76 was estimated to exceed \$2.5 billion.

Mr. Nicholson pointed out that extensive preparation was necessary to permit a filing of a rate request with the Rate Commission in accordance with the Commission's Rules of Practice, that this preparation had been going on for several months, that a number of significant adjustments in what had been prepared were necessary in order to bring the filing into line with the guidance contained in the Commission's opinion of August 28 (particularly in regard to cost attributions to the several categories of mail), that the process was still incomplete in view of the very recent receipt of the Commission's opinion, but that

the general outline of what postal management considered to be appropriate adjustments to the various postal rates was now reasonably clear. The Board then reviewed the general magnitude of the increases in revenue which management deemed necessary and appropriate for each of the principal categories of mail and concluded that the Postal Service should complete the process of refining its proposed filing with the Rate Commission and should endeavor to file its request with the Commission by not later than September 19.

The Board also discussed the fact that fees for various special services had not been adjusted for substantial periods, notwithstanding significant increases in costs, and agreed that the Postal Service should increase these fees as soon as reasonably possible (after allowing a period for public notice and comment on the proposed increases) so as to assure that the fees provided as a minimum full coverage of the costs attributable to these special services.

Mr. Bailar then discussed with the members the points that he intended to make at a speech at the forthcoming National Postal Forum, following which the meeting was adjourned at approximately 4:00 P.M.

LOUIS A. Cox,
Secretary.

APPENDIX F

39 U.S.C. (1970 ed.) 3641 provided in pertinent part:

Temporary changes in rates and classes

(a) If the Postal Rate Commission does not transmit to the Governors within 90 days after the Postal Service has submitted, or within 30 days after the Postal Service has resubmitted, to the Commission a request for a recommended decision on a change in rates of postage or in fees for postal services, or on a change in the mail classification schedule (after such schedule is established under section 3623 of this title), the Postal Service, upon 10 days' notice in the Federal Register, may place into effect temporary changes in rates of postage, in fees for postal service, or in the mail classification schedule it considers appropriate to carry out the provisions of this title. Any temporary change shall be effective for a period ending not later than 30 days after the Commission has transmitted its recommended decision to the Governors.

(b) If, under section 3628 of this title, a court orders a matter returned to the Commission for further consideration, the Postal Service, with the consent of the Commission, may place into effect temporary changes in rates of postage, in fees for postal services, or in the mail classification schedule.

(c) A rate of postage for a class of mail or a fee for a postal service under a temporary change

(104A)

105A

under this section may not exceed the lesser of (1) the rate or fee requested for such class or service, or (2) a rate or fee which is more than one-third greater than the permanent rate or fee in effect for that class or service at the time a permanent change in the rate or fee of such class or service is requested under section 3622 of this title.

APPENDIX G

Pub. L. 94-421, 90 Stat. 1306-1307 (September 24, 1976), provides in pertinent part:

SEC. 5. (a) Section 3624 of title 39, United States Code, is amended by redesignating subsection (c) as subsection (d) and by inserting immediately after subsection (b) the following new subsection:

“(c)(1) Except as provided by paragraph (2) of this subsection, in any case in which the Postal Service makes a request under section 3622 of this title for a recommended decision by the Commission on changes in a rate or rates of postage or in a fee or fees for postal services the Commission shall transmit its recommended decision to the Governors under subsection (d) of this section no later than 10 months after receiving any such request from the Postal Service.

“(2) In any case in which the Commission determines that the Postal Service has unreasonably delayed consideration of a request made by the Postal Service under section 3622 by failing to respond within a reasonable time to any lawful order of the Commission, the Commission may extend the 10-month period described in paragraph (1) of this subsection by one day for each day of such delay.”

(b) The amendment made by subsection (a) of this section shall not apply to any action or proceeding with respect to the recommended decision of the Postal Rate Commission relating to pro-

(106A)

posed changes in rates of postage, and in fees for postal services, requested on September 18, 1975, by the United States Postal Service in a request which bears, or which at any time has been included under, Postal Rate Commission Docket Number R76-1.

SEC. 6. (a) Section 3641 of title 39, United States Code, is amended to read as follows:

“§ 3641. Temporary changes in rates and classes

“(a) In any case in which the Postal Rate Commission fails to transmit a recommended decision on a change in rates of postage or in fees for postal services to the Governors in accordance with section 3624(c) of this title, the Postal Service may establish temporary changes in rates of postage and in fees for postal services in accordance with the proposed changes under consideration by the Commission. Such temporary changes may take effect upon such date as the Postal Service may determine, except that such temporary changes may take effect only after 10 days' notice in the Federal Register.

“(b) Any temporary rate or fee established by the Postal Service under subsection (a) of this section shall be in accordance with the policies of this title and shall not exceed such amount as may be necessary for sufficient revenues to assure that the total estimated income, including appropriations, of the Postal Service shall, to the extent practicable, be equal to the total estimated costs of the Postal Service.

“(c) Notwithstanding the provisions of subsection (b) of this section, the Postal Service may not establish any temporary rate for a class of mail or any temporary fee for a postal service

which is more than the permanent rate or fee requested for such class or postal service by the Postal Service under section 3622 of this title.

“(d) Any temporary change in rates of postage or in fees for postal services made by the Postal Service under this section shall remain in effect no longer than 150 days after the date on which the Commission transmits its recommended decision to the Governors under section 3624(d) of this title, unless such temporary change is terminated by the Governors before the expiration of such period.

“(e) If the Postal Rate Commission does not transmit to the Governors within 90 days after the Postal Service has submitted, or within 30 days after the postal Service has resubmitted, to the Commission a request for a recommended decision on a change in the mail classification schedule (after such schedule is established under section, 3623 of this title), the Postal Service, upon 10 days' notice in the Federal Register, may place into effect temporary changes in the mail classification schedule in accordance with proposed changes under consideration by the Commission. Any temporary change shall be effective for a period ending not later than 30 days after the Commission has transmitted its recommended decision to the Governors.

“(f) If, under section 3628 of this title, a court orders a matter returned to the Commission for further consideration, the Postal Service, with the consent of the Commission, may place into effect temporary changes in rates of postage, and fees for postal services, or in the mail classification schedule.”.

(b)(1) The amendment made by subsection (a) of this section shall not apply to any action or proceeding with respect to the recommended decision of the Postal Rate Commission relating to proposed changes in rates of postage and in fees for postal services requested on September 18, 1975, by the United States Postal Service in a request which bears, or which at any time has been included under, Postal Rate Commission Docket Number R76-1.

(2) The provisions of section 3641 of title 39, United States Code, as such provisions were in effect on the day before the date of the enactment of this Act, shall apply to any temporary rate or fee established by the Postal Service pursuant to its request to the Postal Rate Commission, dated September 18, 1975, for a recommended decision, bearing Docket Number R76-1.

APPENDIX H

United States Court of Appeals for the District of
Columbia Circuit

No. 75-2227—SEPTEMBER TERM, 1976.

Civil Action #75-1809

ASSOCIATED THIRD CLASS MAIL USERS
NATIONAL EASTER SEAL SOCIETY FOR CRIPPLED
CHILDREN AND ADULTS

v.

UNITED STATES POSTAL SERVICE, APPELLANT
POSTAL RATE COMMISSION, ET AL.

No. 75-2228

[United States Court of Appeals for the District of
Columbia Circuit, Filed April 21, 1977, George A.
Fisher]

Civil Action #75-1809

ASSOCIATED THIRD CLASS MAIL USERS
NATIONAL EASTER SEAL SOCIETY FOR CRIPPLED
CHILDREN AND ADULTS

v.

UNITED STATES POSTAL SERVICE
POSTAL RATE COMMISSION, ET AL., APPELLANTS

Before: BAZELON, Chief Judge; WRIGHT, McGOWAN,
TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB
and WILKEY, Circuit Judges.

(110A)

111A

ORDER

The suggestion for rehearing *en banc* filed by appel-
lant United States Postal Service having been trans-
mitted to the full Court, and no judge having re-
quested a vote with respect thereto, it is

ORDERED by the Court, *en banc*, that appellant's
aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam.

For the Court:

GEORGE A. FISHER,
Clerk.

Supreme Court, U. S.
FILED

SEP 19 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-292

UNITED STATES POSTAL SERVICE,
Petitioner

v.

ASSOCIATED THIRD CLASS MAIL USERS,
Respondent

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit**

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
Question presented	1
Statement of the case	1
Argument	8
I The Case Is Not Moot	8
II There Is No Conflict of Decision	10
III The Decision Below Is Clearly Correct	12
IV There Is No Important Issue As A Basis For Granting Certiorari	13
Conclusion	14
Appendix A	1A
Appendix B	9A
Appendix C	11A

CITATIONS

Cases:

<i>American Farm Lines v. Black Ball Freight Service</i> , 397 U.S. 532 (1970)	10
<i>Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission</i> , 485 F(2d) 786 (D.C. Cir. 1973)	7
<i>Mail Advertising Corporation of America v. United States Postal Service</i> , 459 F(2d) 1182 (D.C. Cir. 1972)	7, 12
<i>O'Shea v. Littleton</i> , 414 U.S. 488 (1974)	13
<i>United States ex rel. Accardi v. Shaughnessy</i> , 347 U.S. 260 (1954)	11
<i>Vitarelli v. Seaton</i> , 359 U.S. 535 (1959)	11

CITATIONS—Continued

Statutes and regulations:

39 U.S.C. § 3641	12
39 U.S.C. § 3681	7
39 C.F.R. Part 3	3

Other:

PRC Opinion and Recommended Decision, Docket No. R76-1	5
PRC Order No. 91, Docket No. R76-1	5

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-292

UNITED STATES POSTAL SERVICE,
Petitioner

v.

ASSOCIATED THIRD CLASS MAIL USERS,
Respondent

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the United States Postal Service filed a valid request with the Postal Rate Commission on September 18, 1975, for a recommended decision on changes in postal rates.

STATEMENT OF THE CASE

Pursuant to U.S. Sup. Ct. Rule 40(3), the following statement by Associated Third Class Mail Users

("ATCMU") is limited to correction of inaccuracy or omission in the statement of petitioner.

In regard to the Board of Governors meeting on September 4, 1975, petitioner quotes in its brief only selected portions of the minutes.¹ However, as noted below in italics, a significant statement in the minutes was not quoted by petitioner. Since the minutes contain only two short paragraphs on the subject at issue, for the benefit of the Court, we quote the relevant portion of the minutes in its entirety:

"Mr. Nicholson and Mr. Eden joined the meeting and the members discussed the necessity for the Postal Service requesting the Postal Rate Commission for a recommended decision on further changes in postal rates at the earliest practicable time in view of the very substantial financial deficits that the Postal Service would continue to incur unless adjustments were made in the rates approved earlier in the meeting. Without adjustment in those rates, the deficit for FY 76 was estimated to exceed \$2.5 billion."

"Mr. Nicholson pointed out that extensive preparation was necessary to permit a filing of a rate request with the Rate Commission in accordance with the Commission's Rules of Practice, that this preparation had been going on for several months, *that a number of significant adjustments in what had been prepared were necessary in order to bring the filing into line with the guidance contained in the Commission's opinion of August 28 (particularly in regard to cost attributions to the several categories of mail)*, that the process was still incomplete in view of the very recent receipt of the Commission's opinion, but that the general outline of what postal management considered to be appropriate adjustments to the

¹ The full minutes are attached as Appendix E, pp. 100A-103A, to the Postal Service's petition.

various postal rates was now reasonably clear. The Board then reviewed the general magnitude of the increases in revenue which management deemed necessary and appropriate for each of the principal categories of mail and concluded that the Postal Service should complete the process of refining its proposed filing with the Rate Commission and should endeavor to file its request with the Commission by not later than September 19." (Emphasis added.)

The prospect of and necessity for "significant adjustments" still to be made in the "general outline" of rate increases demonstrates why the Board was not apprised of the specific rate increases to be proposed and was not and could not be shown back-up justification for specific rate increases which was essential to having a valid request. As of September 4, 1975, there were no *specific* rate increases available for action by the Board of Governors.

The Bylaws of the Board of Governors (39 CFR Part 3) provide as follows:

"§ 3.9 Delegation of authority by Board.

Pursuant to 39 U.S.C. section 402, the Postmaster General is hereby delegated the authority to exercise the powers of the Postal Service to the extent that such delegation of authority does not conflict with powers reserved to the Governors or the Board by law, these bylaws, or resolutions adopted by the Board." (Emphasis added.)

By Operating Procedures (Resp. App. A, p. 1A) adopted by resolution of the Board of Governors, the Board has negated any delegation of authority relating to requests to the Commission for recommended decisions on rate increases. Under the Operating Procedures, such requests are reserved for decision by the Board of Gov-

ernors. The Operating Procedures thus provide in part as follows:

"Decisions of the Board.

The procedures establish a system under which the Board will make those decisions which by statute the Board, or the presidentially-appointed Governors, are required to make and under which the Board will make such additional decisions and approve such actions recommended by postal management as are of sufficient importance, in the judgment of the Board, to require Board Action.

* * *

"II. Actions Requiring Decision by the Board of Governors.

The following matters are reserved for decision by the Board of Governors:

* * *

- "8. Requests to the Postal Rate Commission for recommended decisions on postal rates and mail classification, and action upon such recommended decisions (by the Governors, 39 U.S.C. § 3625)." (Resp. App. A. p. 3A, 4A)

Thus, Paragraph 8 of the Operating Procedures makes it clear that the request to the Commission for a recommended decision on changes in postal rates is a matter reserved for decision by the Board of Governors.

The Board, on September 4, 1975, approved at most only the general contours of a purported rate request. U.S. Postal Service General News Release dated September 5, 1975, the day after the Board of Governors met, includes the following:

"Postage rates will not increase until after Christmas, Postmaster General Benjamin F. Bailar announced today. Bailar said that the Postal Service will file with the Postal Rate Commission for the new rates 'some time in the next two weeks.'

"If the Commission does not act within 90 days of filing, the Postal Service may increase rates on a 'temporary' basis.

"The exact amounts of the increases to be requested have not been finally determined, but they are expected to include 13-cents for the first ounce of ordinary first-class mail, with appropriate increases for other classes of mail." (Emphasis added.)

Subsequent to the Postal Service's Federal Register notice on October 9, 1975 that it would institute a temporary rate increase (the so-called "13-cent rate") as of December 28, 1975, ATCMU filed an "Objection" with the Postal Rate Commission requesting that the rate proceedings be halted because the Governors had failed to approve the rate request before filing with the Commission. The Commission denied ATCMU's request on October 21, 1975. PRC Order No. 91, Docket No. R76-1. See also PRC Opinion and Recommended Decision, Docket No. R76-1, Vol. 1, p. 4. On October 31, 1975, ATCMU filed its complaint in the United States District Court for the District of Columbia seeking declaratory and injunctive relief, in addition to "[s]uch other and further relief as this Court may deem just and proper." ATCMU specifically requested a judgment "enjoining the USPS from putting into effect temporary rates as presently proposed."² The District Court, in an opinion by Judge John J. Sirica, granted ATCMU's request, ordering

"[t]hat since there is no valid request presently before the Postal Rate Commission for a recommended decision on postal rates, defendants may not legally set or put into effect temporary increases on postal rates until a legal request is made and the other

² In this suit, ATCMU also challenged the authority of the Postal Service to increase fees for special services without going to the Postal Rate Commission. The courts below upheld ATCMU's position that the Postal Rate Commission has jurisdiction over special services. The Postal Service has not sought review of this ruling.

statutory requirements of Chapter 36 of the Act are met."

(Pet. App. D, p. 99A)

The District Court denied the Postal Service's application for a stay on December 18, 1975. However, on December 19, 1975—the same day the Board of Governors met at a special meeting to review the specific rates and fees and to direct the Service to submit a "legal" request to the Commission—the Postal Service filed in the United States Court of Appeals for the District of Columbia Circuit a Motion for a Stay Pending Expedited Appeal of the District Court's judgment. On December 29, 1975, the Court of Appeals granted the Postal Service's motion "only as to that portion of the order of the District Court which relates to rates."³ (Resp. App. B, p. 9A). Immediately thereafter, on December 31, 1975, the Postal Service put into effect the temporary 13-cent rate.

In view of the stay of Judge Sirica's order and the resultant imposition of the temporary rate increase, ATCMU filed a motion on January 2, 1976 for an order by the Court of Appeals

"requiring that proceeds attributable to the challenged postal rate increases be placed in escrow in a special segregated account to be available for payment of refunds in the event this Court affirms the judgment of Judge Sirica."

The Court denied our motion on January 5, 1976. (Resp. App. C, p. 11A).

In its brief, filed February 9, 1976, ATCMU requested the Court of Appeals, if it affirmed Judge Sirica's order,

³ On December 30, 1975, ATCMU filed an Emergency Petition to Mr. Chief Justice Burger for an order vacating the stay granted by the Court of Appeals. This petition was denied.

to fashion relief in regard to the illegally collected temporary rate increases:

"RELIEF REQUESTED

"It is urged (1) that the Court affirm Judge Sirica's order on both issues, and (2) that on the temporary rate issue the Court fashion a remedy for restoring the *status quo* and for giving the public restitution for the temporary rate increases illegally collected since December 31, 1975.

"Refunds of illegally imposed rates in the situation present here are clearly not barred by 39 U.S.C. Sec. 3681. That section bars refunds only in two specific situations not even remotely applicable here. Cf. *Mail Advertising Corporation of America v. United States Postal Service*, 459 F(2d) 1182 (D.C. Cir. 1970).

"In their 'Reply to Appellee's Opposition' document filed in this Court on December 22, 1975, Appellants [the Postal Service] stated as follows in a footnote on page 8:

'We are advised by the Postal Service that allowing the increase to take effect on December 28, and then rescinding that increase should plaintiffs prevail, would pose fewer administrative problems than denying the Government any relief at all.'

"This Court has extensive precedent on judicial participation in fashioning restitution plans following invalid rate increases (transit fares). See, for example, *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F(2d) 786 at page 823 (D.C. Cir. 1973).

"It is urged that the Court order that all the temporary rate increases be rescinded for the same number of days beginning on December 31, 1975, that such

increases have been illegally collected and further order that increased rates (whether temporary or permanent) may be reimposed, assuming all other legal requirements are met, only after such number of days have expired.

"Thus, for example, if this Court announced its decision on March 8, 1976, the temporary rate increases would have to be rescinded on an early date to be determined by the Court, such as March 14, 1976, and increases (whether temporary or permanent) would have to remain off for 74 days, the number of days between December 31, 1975, and March 14, 1976. This would provide restitution of the illegal increases for all classes of mail and would permit the *status quo* to be restored to the maximum extent practicable."

ATCMU brief at p. 49-50. The Court of Appeals did not discuss this requested relief in its opinion affirming Judge Sirica's order enjoining the implementation of the temporary rates until a legal request is made.

ARGUMENT

The issues presented in the Postal Service's petition do not warrant review by this Court on certiorari.

I

THE CASE IS NOT MOOT

The Petitioner argues that "[r]espondent's claim for declaratory and injunctive relief against the promulgation of the temporary 13-cent rate was moot when the court of appeals issued its decision." Petition, p. 10. First, the Postal Service misstates ATCMU's claim for relief. At the time ATCMU filed its complaint in the District Court, the temporary rate increase was not yet in effect; for this reason, a specific request for declara-

tory and injunctive relief was all that was appropriate. However, a general request for "[s]uch other and further relief as this Court may deem just and proper" was also made by ATCMU in its complaint.

After the Postal Service requested and the Court of Appeals granted a stay of Judge Sirica's order—allowing the imposition of the temporary rate increase—preventive measures no longer sufficed. Consequently, ATCMU requested the Court of Appeals to order the creation of a special segregated account to keep in escrow the postage charges collected by the Postal Service which were attributable to the challenged postal rate increases. The Postal Service opposed this motion and therefore has created its own financial predicament.

As quoted *supra* at p. 7-8, ATCMU specifically requested the Court of Appeals, if it affirmed Judge Sirica's order, to fashion a remedy

"for restoring the *status quo* and for giving the public restitution for the temporary rate increases illegally collected since December 31, 1975."

In other words, if the Court of Appeals found that Judge Sirica's order preventing implementation of the temporary rates in December, 1975 was properly granted, ATCMU requested the Court to correct the inequity caused by the Court's stay of Judge Sirica's order and the required payment by mailers of illegally increased postage rates. One method ATCMU urged the Court to adopt was to rescind the temporary rate increase for the same number of days that the increase was illegally in effect. This suggestion was in accordance with the Postal Service's representation to the Court of Appeals in support of its Motion for a Stay that

"allowing the increase to take effect on December 28, and then rescinding that increase should plain-

tiffs prevail, would pose fewer administrative problems than denying the Government any relief at all."

See p. 7, *supra*.

Although it is true that the Court of Appeals did not speak to ATCMU's request for relief, the important point for purposes of the Postal Service's petition to this Court for certiorari is that ATCMU's request was pending before the Court of Appeals. For this reason alone, the case was *not* moot when the Court of Appeals issued its decision. This conclusion remains true despite the fact that the challenged temporary rates were superseded at the time the Court of Appeals issued its decision in December 1976.

Moreover, for the reasons stated in footnote 107 of the Court of Appeals decision, Pet. App. A, p. 49A, the case was not moot when decided by the Court of Appeals. As stated by the Court of Appeals, it falls under two well settled exceptions to the mootness doctrine: it is within the "voluntary cessation of illegal activity" exception; and, it is within the "capable of repetition yet evading review" exception.

II

THERE IS NO CONFLICT OF DECISION

Petitioner asserts that the decision of the Court of Appeals is inconsistent in principle with this Court's decision in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970). However, petitioner does not allege a conflict on any matter of law or fact, nor does any such conflict exist. This Court listed exceptions to the *American Farm* holding which were cited by the Court of Appeals. In *American Farm*, this Court distinguished cases

"in which an agency required by rule to exercise independent discretion has failed to do so. *Accardi v. Shaughnessy*, 347 U.S. 260;"

397 U.S. at 539. The Court of Appeals, in a long footnote rejecting the Postal Service's similar contention below, stated:

"Since the Board promulgated the rules to govern its proceedings and since those proceedings have substantial public impact, the rules, until properly changed, must be scrupulously observed even if more binding than the Act [Postal Reorganization Act]. See, e.g., . . . *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954);"

Pet. App. A, p. 63A. Thus, a reasonable inference is that the Court of Appeals concluded that the Board was required "to exercise independent discretion and failed to do so."

Moreover, the Court of Appeals continued its statement demonstrating that there is no conflict in principle either:

"Indeed, appellees argue with some persuasiveness that public policy and the Act itself, quite apart from any rules of practice adopted by the Board, mandate the Board's thorough involvement in the process of submitting rate requests and thus by their own force would require reversal of the Board's action in approving management's tentative proposal since that proposal included only the 'general magnitude' of increases to be recommended to the Commission.

* The Court of Appeals also cited *Vitarelli v. Seaton*, 359 U.S. 535 (1959) in this footnote. Pet. App. A, p. 63A. In *American Farm*, this Court also cited *Vitarelli* as an example of another exception when the rules were intended

"primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion as in *Vitarelli v. Seaton*, 359 U.S. 535;"

397 U.S. at 538-39.

They note that the Governors (who predominate on the Board), unlike the Commission, are 'chosen to represent the public interest generally,' 39 U.S.C. § 202(a), and that it is far from settled whether the Postal Service must provide a hearing prior to implementation of temporary rates, *see Mail Advertising Corp. of America v. USPS*, 148 U.S.App.D.C. 158, 159, 459 F.2d 1182, 1183 (1972). They conclude from this that the Act therefore requires intimate Board involvement in the request submission process as the only practicable avenue for public input into the important function of setting temporary rates, basing this conclusion on three primary considerations: (1) that it is the Board 'which exercises the power of the Postal Service to set temporary rates,' *id.*; (2) that it is the request for new permanent rates which in practical and legal effect 'sets' temporary rates, *see* 39 U.S.C. § 3641; and (3) that at least under present circumstances 'temporary' rates are vitally significant since they have been in effect for a longer period of time than their supposedly 'permanent' counterparts. Because the Postal Service's action was in violation of its governing rules of practice, however, we need not reach this issue and therefore express no final determination of it."

Pet. App. pp. 63A-64A. For these reasons, the Board's violation of its own operating procedures *cannot* be characterized as "merely technical", Petition, p. 16, and the prejudice to the public interest, including the interest of ATCMU and its members, is apparent.

III

THE DECISION BELOW IS CLEARLY CORRECT

The decision below is clearly correct in holding that the Governors violated the operating procedures, Resp. App. A, p. 1A. The Court of Appeals opinion and Judge

Sirica's opinion, Pet. App. A, pp. 56A-65A; Pet. App. D, pp. 84A-92A, have in no way been rebutted or weakened by petitioner. Therefore, the opinions need no further elaboration.

IV

THERE IS NO IMPORTANT ISSUE AS A BASIS FOR GRANTING CERTIORARI

Petitioner claims that "significant collateral legal consequences", Petition, p. 10, 11, provide a basis for this Court to grant certiorari. But the only issue which the Postal Service raises is the *potential possibility* of the occurrence of a *future event*. The Postal Service states:

It is our understanding that certain mailers may file suit seeking refunds or other relief with respect to these rates.

Petition, p. 10. There is no citation to any pending litigation. There is no citation that any mailers have sought refunds through administrative channels. If petitioner made such uncertain allegations in a complaint, they certainly would be judged not yet ripe for adjudication. *O'Shea v. Littleton*, 414 U.S. 488 (1974).

In an effort to correct what it surely recognizes as a deficiency in its petition, the Postal Service estimates that \$500 million more revenue was generated by the temporary rates held invalid by the Court of Appeals.⁵ Presumably, the Postal Service hopes this Court will look upon \$500 million, a large amount of money, as a persuasive factor in granting certiorari. Although \$500 million is less than four percent of the total income of the Postal Service for fiscal year 1976,⁶ we also believe

⁵ No estimate is offered by Petitioner as to what portion of this amount might include records of payment sufficient to support refund claims.

⁶ Annual Report of the Postmaster General, Fiscal 1976 & Transition Quarter, p. 29.

that \$500 million is a large amount of money. It is for this reason, in addition to the reasons previously stated, that the Court of Appeals decision is correct in holding that the information presented at the Board of Governors September 4 meeting fell substantially short of meeting the requirements for the Board's consideration of and action on a rate increase request.

Furthermore, the fact that a large amount of money is involved—though \$500 million is not large percentage wise for the Postal Service—should not be sufficient *by itself* for this Court to grant certiorari, especially in view of the in-depth consideration of the issues by both the Court of Appeals and the District Court, both of which upheld ATCMU.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Alternatively, if certiorari is granted, ATCMU respectfully requests this Court to order this case remanded to Judge Sirica in the District Court for the limited purpose of fashioning a remedy to overcome the effect of the granting of the stay of the District Court injunction by the Court of Appeals.

Respectfully submitted,

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September 19, 1977

APPENDICES

1A

APPENDIX A

BOARD OF GOVERNORS
OF THE
UNITED STATES POSTAL SERVICE

OPERATING PROCEDURES

December

1971

1. *Introduction*

The United States Postal Service is an independent establishment created by Act of Congress to be operated as a "basic and fundamental service" under management that is expected to be "honest, efficient, and economical." The Postal Service is charged by law with responsibility for providing prompt, reliable and efficient postal services throughout the nation, and its statutory charter, the Postal Reorganization Act, clothes the Postal Service with extensive powers intended to enable it to carry out its responsibilities effectively and economically.

The exercise of these powers is directed by the Board of Governors of the Postal Service, consisting of nine private citizens chosen by the President to represent the public interest generally, together with the Postmaster General and Deputy Postmaster General. The Board of Governors directs and controls the expenditures of the Postal Service, reviews its practices and policies, and establishes basic objectives and long-range goals in consonance with the provisions of the Postal Reorganization Act.

As authorized by law, and in keeping with the Board's conception of how the public interest may best be served, authority to conduct the operations of the Postal Service has been delegated to the Postmaster General. The procedures set forth herein represent the framework of the system through which the Board of Governors monitors the exercise of the authority it has delegated, measures progress toward the goals it has set, and shapes the policies by which the future development of the Postal Service will be guided.

The procedures are intended to insure that significant information on developments meriting attention by the Board is brought before the Board in a timely manner, as well as insuring that the Board obtains the data it

needs as a predicate for final determination of the level of costs to be incurred by the Postal Service, for action on recommendations by the Postal Rate Commission, and for other decisions to be made by the Board.

Decisions of the Board

The Procedures establish a system under which the Board will make those decisions which by statute the Board, or the presidentially-appointed Governors, are required to make and under which the Board will make such additional decisions and approve such actions recommended by postal management as are of sufficient importance, in the judgment of the Board, to require Board action.

Review by the Board

The Procedures establish a review process intended to permit the Board to control and be fully informed about:

- how the Postal Service is operating*—requiring a quantitative analysis; and
- how well the Postal Service is operating*—requiring a qualitative analysis.

Information will be provided principally by statistical data to be made available before—and to be reviewed at—each regular meeting of the Board and by a systematic review of the principal programs affecting operations and quality of performance. In addition, miscellaneous information of an important character will be presented to the Board, when and as appropriate, in accordance with guidelines intended to assure that no subject requiring Board attention will fail to be brought before the Board.

II. Actions Requiring Decision by the Board of Governors

The following matters are reserved for decision by the Board of Governors:

4A

1. Selection, compensation, and removal of the Postmaster General (by the Governors, in accordance with 39 U.S.C. § 202(c)).
2. Selection, compensation, and removal of the Deputy Postmaster General (by the Governors and the Postmaster General, 39 U.S.C. § 202(d)).
3. Selection of the Chairman of the Board of Governors, (by the Governors, 39 U.S.C. § 202(a)) and the Secretary of the Board.
4. Adoption of the bylaws of the Board and amendments thereto.
5. Approval of the annual Postal Service Budget, in both tentative and final form, including requests for Congressional appropriations.
6. Approval of the Postal Service's five year plans and capital investment plans, including specific approval of each capital investment project (other than those included in the bulk mail network as of the date of adoption of these procedures) exceeding ten million dollars. Operating plans and reprogramming actions will be reviewed by the Board as outlined in section III below, and the Board shall receive quarterly reports on capital investment projects undertaken during the preceding quarter without specific Board approval.
7. Approval of the budget of the Postal Rate Commission or adjustments thereto (by the Governors, 39 U.S.C. 3604(c)).
8. Requests to the Postal Rate Commission for recommended decisions on postal rates and mail classification, and action upon such recommended decisions (by the Governors, 39 U.S.C. § 3625).
9. Requests to the Postal Rate Commission for advisory opinions on proposed changes in the nature of postal

5A

services generally affecting service on a nationwide or substantially nationwide basis.

10. Any exercise of the authority of the Postal Service to borrow money under 39 U.S.C. § 2005, exclusive of short-term "line-of-credit" borrowings and purchase money obligations assumed in the normal course of business (which shall be reviewed by the Board as outlined in section III below.) The Board shall determine the terms and conditions of each issue of obligations by the Postal Service, the time and manner of sale, and the underwriting arrangements with respect thereto, and no action to require the Secretary of the Treasury to purchase Postal Service obligations under 39 U.S.C. § 2006(b) or to request the Secretary of the Treasury to pledge the full faith and credit of the Government of the United States under 39 U.S.C. § 2006(c) shall be taken without authorization by the Board.
11. The number of Assistant Postmasters General (including Senior Assistant Postmasters General) and Regional Postmasters General.
12. Compensation of officers and executives in PES Grade 23 and above.
13. Selection of an independent, certified public accounting firm under 39 U.S.C. § 2008(e).
14. Adoption of the annual report under 39 U.S.C. § 2402.
15. All other matters that the Board may consider appropriate for decision by the Board.

III. *Matters to be Reviewed by the Board of Governors.*

The Board will monitor the operations and performance of the Postal Service through statistical reports, program reviews, and specialized reports, as follows:

A. Statistical Reports

Prior to each regular meeting, the Board will be furnished reports, primarily of a statistical nature, aimed at presenting an overview of postal operations and performance during the most recent accounting period or periods for which data are available.

1. *Operating Results.* Through detailed Summaries of Financial and Operating Statements of the Postal Service for each accounting period, the Board will be informed of the amount of activity during the accounting period and during the year to date—in relation to comparable prior year figures and in relation to the operating plan adopted under the budget—categorized as follows:

Income (revenue, further categorized by principal mail classifications; subsidy; and reimbursements).

Expenditures (by function and by organizational unit).

In addition, balance sheet information will be provided for each accounting period.

2. *Performance Data.* Management will supply the following data no less frequently than every quarter:

Service performance measurement, categorized by particular classes and types of mail and showing delivery times within representative mileage categories.

Employee productivity measurement, reflecting data on employment levels (paid hours) and mail volume.

B. Program Review

1. *The Operating Program.* The Board will review, and approve as appropriate, all aspects of the Postal Service budget plan, including:
 - (a) the tentative annual budget submitted to the Office of Management and Budget in the early fall of each year; the final budget approved in December or January; amendments to the budget; five-year, operating and capital investment plans;
 - (b) the annual operating and capital investment plans and significant departures from estimates upon which the plans were based;
 - (c) the need for rate increases or decreases and the progress of any pending rate cases or litigation relating thereto;
 - (d) subsidy needs and the progress of appropriations legislation pending in the Congress; and
 - (e) debt financing needs, including a review of all borrowings of the Postal Service from the United States Treasury and from private sources.
2. *The Performance Programs.* Major programs for improving postal service or reducing the cost of postal operations will be reviewed by the Board on a regular basis.

C. Specialized Reports

1. *Personnel Matters.* Management will bring to the Board's attention major developments in the personnel area, including matters involving collective bargaining, equal employment opportunity, career development and training, grade and

salary structures, and related programs for non-bargaining unit employees.

2. *Other Matters of Special Importance.* Management will keep the Board advised of important initiatives in the research and development area; consultations with the Postal Service Advisory Council; major changes in the organizational structure of the Postal Service; major litigation and law enforcement activities; and other matters having a significant impact upon the relationship of the Postal Service with its employees, with any major branch of the Government, or with the general public.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

Civil Action 75-1809

No. 75-2227

ASSOCIATED THIRD CLASS MAIL USERS
NATIONAL EASTER SEAL SOCIETY FOR
CRIPPLED CHILDREN AND ADULTS

v.

UNITED STATES POSTAL SERVICE,
Appellant

POSTAL RATE COMMISSION, et al.

No. 75-2228

ASSOCIATED THIRD CLASS MAIL USERS
NATIONAL EASTER SEAL SOCIETY FOR
CRIPPLED CHILDREN AND ADULTS

v.

UNITED STATES POSTAL SERVICE
POSTAL RATE COMMISSION, et al.,
Appellants

Before: Bazelon, Chief Judge; Robinson and MacKinnon, Circuit Judges.

10A

ORDER

On consideration of appellants' motion for stay and for partial summary reversal and of the responses thereto, it is

ORDERED by the Court that the motion for partial summary reversal is denied, and it is

FURTHER ORDERED by the Court that appellants' motion for stay is granted only as to that portion of the order of the District Court which relates to rates.

Per Curiam

11A

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

Civil Action #75-1809

No. 75-2227

ASSOCIATED THIRD CLASS MAIL USERS
NATIONAL EASTER SEAL SOCIETY FOR
CRIPPLED CHILDREN AND ADULTS

v.

UNITED STATES POSTAL SERVICE,
Appellant

POSTAL RATE COMMISSION, et al.

No. 75-2228

ASSOCIATED THIRD CLASS MAIL USERS
NATIONAL EASTER SEAL SOCIETY FOR
CRIPPLED CHILDREN AND ADULTS

v.

UNITED STATES POSTAL SERVICE
POSTAL RATE COMMISSION, et al.,
Appellants

BEFORE: Bazelon, Chief Judge; Robinson and Mac-
Kinnon, Circuit Judges

12A

ORDER

On consideration of appellee's (Associated Third Class Mail Users) motion for order requiring that proceeds from rate increases be held in escrow in special segregated account, and withdrawal, etc., it is

ORDERED by the Court that appellee's aforesaid motion is denied and the withdrawal is noted.

Per Curiam

No. 77-292

Supreme Court, U. S.

FILED

OCT 6 1977

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES POSTAL SERVICE, PETITIONER

v.

ASSOCIATED THIRD CLASS MAIL USERS

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

**REPLY MEMORANDUM FOR THE UNITED STATES
POSTAL SERVICE**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-292

UNITED STATES POSTAL SERVICE, PETITIONER

v.

ASSOCIATED THIRD CLASS MAIL USERS

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

**REPLY MEMORANDUM FOR THE UNITED STATES
POSTAL SERVICE**

1. Respondent incorrectly contends (Br. in Opp. 8-10) that this case is not moot. Respondent argues that its original complaint in the district court requested both declaratory and injunctive relief and "[s]uch other and further relief as this Court may deem just and proper"; that as appellee in the court of appeals it preserved its plea for such "other" relief by requesting that court not only to affirm the award of injunctive relief but also to provide " 'restitution for the temporary rate increases illegally collected since December 31, 1975' " (Br. in Opp. 9); and that although restitution was not awarded by the court of appeals, and respondent has not sought review of the decision below, its rejected claim for restitution prevents the case from becoming moot. This chain of reasoning contains several legal errors.

On November 4, 1975, respondent moved for a preliminary injunction (App. A, *infra*), but the parties stipulated on November 21, 1975, that that motion would be treated as a motion for summary judgment (App. B, *infra*). On December 16, 1975, the district court granted the motion and enjoined the Postal Service from placing the temporary rates into effect until it complied with procedures set forth in the court's opinion (Pet. App. 99A).¹ The order therefore finally disposed of respondent's complaint and prayer for relief. Respondent did not appeal from the order, but instead appeared in the court of appeals only as an appellee. It is well settled, however, that an appellee may not, without taking its own appeal, urge an appellate court to enlarge the scope of the lower court's judgment in its favor. *United States v. American Ry. Express Co.*, 265 U.S. 425, 435; *United Optical Worker's Union Local 408 v. Sterling Optical Co., Inc.*, 500 F. 2d 220, 224 (C.A. 2). Accordingly, the court of appeals was without jurisdiction to consider respondent's request for relief beyond that granted by the district court, and the court's silence concerning that request reflects its lack of jurisdiction.

In short, by the time it was submitted to the court of appeals, this case concerned only respondent's request for declaratory and injunctive relief. For the reasons stated in our petition for a writ of certiorari (pp. 10-14), therefore, the case was moot by the time the court of appeals issued its decision.

¹While the court did not describe its order as a permanent injunction, the order unambiguously had the effect of a permanent injunction. Unlike a preliminary injunction, which would have been effective only during the pendency of a decision on the merits, the court's order restrained the Postal Service until it satisfied the conditions established in the court's opinion, which itself was the decision on the merits.

Moreover, even if respondent preserved its claim for other relief in the court of appeals, it has not done so in this Court. Respondent has not filed a petition for a writ of certiorari to review the court of appeals' failure to provide the "other" relief it requested, and the time for seeking review has long since passed. Only declaratory and injunctive relief are now at issue, and respondent's only interest in such relief lies not in the relief itself but in the possible collateral consequences of the legal holding upon which that relief was based (see Pet. 10-14). An interest of that kind does not save a case from mootness; to the contrary, the existence of such an interest underscores the propriety of vacating the judgment below as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36; cf. *Roe v. Wade*, 410 U.S. 133, 125.²

2. Respondent, relying upon *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, and *Vitarelli v. Seaton*, 359 U.S. 535, argues (Br. in Opp. 10-12) that the later decision in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, is inapplicable here and that the Board of Governors was required to follow its internal operating procedures because the proceedings those procedures govern "have substantial public impact" (Br. in Opp. 11). But those operating procedures, like the

²Respondent argues (Br. in Opp. 13-14) that any collateral consequences of the decision below are only "potential possibilit[ies]." But it is precisely the existence of such possibilities that warrants vacating the judgment below to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *United States v. Munsingwear, Inc.*, *supra*, 340 U.S. at 41. See also *United States v. Hamburg—American Co.*, 239 U.S. 466, 475. Moreover, respondent's assertion (Br. in Opp. 14) that "a large amount of money is involved," coupled with its emphasis on its claim for restitution (*id.* at 7-8), suggests that the possibility that the decision below will spawn collateral consequences is hardly remote.

regulations involved in *American Farm Lines*, were designed "to assure the Board the data necessary for decision" (Pet. 16, n. 12; Pet. App. 58A-59A), not "to confer important procedural benefits upon individuals * * * as in *Vitarelli* * * *." *American Farm Lines v. Black Ball Freight Service*, *supra*, 397 U.S. at 538-539. Accordingly, "there is no reason to exempt this case from the general principle that '[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it * * *.'" *Id.* at 539.³

For the reasons stated here and in our petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General.

OCTOBER 1977.

³Respondent also asserts that the Board's operating procedures were adopted by resolution and therefore, under 39 C.F.R. 3.9, "negated any delegation of authority relating to requests to the Commission for recommended decisions on rate increases" (Br. in Opp. 3). This contention is factually incorrect. The operating procedures were adopted in December 1971 by motion, not by resolution (App. C, *infra*, p. 6a). Accordingly, those procedures did not detract from the Postmaster General's broad delegated "authority to exercise the powers of the Postal Service to the extent that such delegation of authority does not conflict with powers reserved to the Governors or the Board by law, these bylaws, or resolutions adopted by the Board." 39 C.F.R. 3.9.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATED THIRD CLASS MAIL USERS
1725 K Street, N.W., Washington, D.C. 20006

PLAINTIFF,

v.

UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza West, S.W., Washington, D.C. 20260
POSTAL RATE COMMISSION, CLYDE S. DU PONT, CHAIRMAN,
PAUL A. MILTICH, KIERAN O'DOHERTY, FRANK P. SAPONARO,
CARLOS C. VILLARREAL, in their capacities as members of the
POSTAL RATE COMMISSION
2000 L Street, N.W., Washington, D.C. 20268

DEFENDANTS

CIVIL ACTION No. 75-1809

MOTION OF PLAINTIFF ASSOCIATED THIRD CLASS MAIL USERS FOR PRELIMINARY INJUNCTION

Plaintiff, Associated Third Class Mail Users (ATCMU), respectfully moves this Court for a preliminary injunction prohibiting the United States Postal Service from increasing the current fees charged for special and other postal services. A proposed order granting this motion is attached hereto. In support of this motion there is also attached hereto a Memorandum of Points and Authorities. The complaint of ATCMU filed in this case is also submitted in support of this motion.

2a

ATCMU respectfully requests an oral hearing on this motion.

Respectfully submitted,

J. EDWARD DAY

WILLIAM F. TAYLOR

COX, LANGFORD & BROWN
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 785-0200

ATTORNEYS FOR PLAINTIFF
ASSOCIATED THIRD CLASS
MAIL USERS

NOVEMBER 4, 1975

3a

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATED THIRD CLASS MAIL USERS,
PLAINTIFF,
and

NATIONAL EASTER SEAL SOCIETY FOR CRIPPLED
CHILDREN AND ADULTS
APPLICANTS FOR INTERVENTION,
v.

UNITED STATES POSTAL SERVICE, ET AL.,
DEFENDANTS.

CIVIL ACTION No. 75-1809

STIPULATION

The parties through counsel hereby stipulate and agree to the following procedural schedule in this action:

1. Plaintiff's motions for preliminary injunctions shall be treated for purposes of this litigation as motions for summary judgment.
2. Defendants shall file cross-motions for summary judgment on or before November 26, 1975.
3. Plaintiff's shall have until December 5, 1975, to file their reply to defendants' cross-motion for summary judgment.

4a

4. The parties agree that the case will be ready for oral argument on the motions at the Court's convenience any time after December 8, 1975.

J. EDWARD DAY
ATTORNEY FOR PLAINTIFF

KENNETH WELLS PARKINSON
ATTORNEY FOR APPLICANTS FOR
INTERVENTION

PAUL M. TSCHIRHART
ASSISTANT UNITED STATES
ATTORNEY
ATTORNEY FOR DEFENDANTS

APPROVED this 21st day of November, 1975.

UNITED STATES DISTRICT
JUDGE

Filed November 21, 1975
JAMES F. DAVEY, CLERK

5a

APPENDIX C

UNITED STATES POSTAL SERVICE
THE BOARD OF GOVERNORS
Washington, D.C. 20260

MINUTES

A regular meeting of the Board of Governors of the United States Postal Service was held at Postal Service Headquarters, 12th Street and Pennsylvania Avenue, N.W., Washington, D.C. on December 7, 1971. The following members were present:

Theodore W. Braun
Charles Coddington
Patrick E. Haggerty
Merrill A. Hayden
Andrew D. Holt
George E. Johnson
Frederick R. Kappel
E. T. Klassen
Crocker Nevin
M. A. Wright.

Mr. Hargrove presented a revised version of the Postal Service budget program for fiscal year 1973, and there was a detailed review of the changes made since the tentative budget was originally considered by the Board at its September meeting. After discussion, and upon motion duly made, seconded and carried, the Board approved the revised budget program, and directed that it be transmitted to the Office of Management and Budget pursuant to 39 U.S.C. §2009.

It was determined that the budget for fiscal year 1974 should be considered in the context of a longer range plan to be proposed by the operating management.

The Board then discussed a revised draft of the proposed operating procedures, reflecting the suggestions offered at the September meeting, and after certain further changes had been made, and upon motion duly made, seconded and carried, the statement of operating procedures annexed hereto and incorporated herein was approved.

Mr. Holland and Mr. Ellington made a presentation to the Board on the advertising program of the Postal Service, and outlined the estimated increases in revenue that such a program might generate. Subject to further review by management, the Board approved an increase of \$3,870,000 in the advertising budget for Fiscal Year 1972. For planning purposes, tentative approval was given to the Fiscal Year 1973 advertising budget totaling \$17,000,000.

The Board then discussed the draft of a proposed statement on the purpose and goals of the Postal Service, and requested management to present a revised draft for consideration at a future meeting.

Mr. Hayden excused himself from the meeting, and the Governors proceeded to discuss the election of a Chairman and Vice Chairman of the Board. Following such discussion, and upon motion duly made, seconded and unanimously carried, the Governors elected Mr. Frederick R. Kappel to the office of Chairman of the Board, effective immediately, to serve for a term of one year, pursuant to section 5.1 of the Bylaws. Upon motion duly made, seconded, and unanimously carried, Mr. M. A. Wright was then elected Vice Chairman of the Board, to hold office at the pleasure of the Board pursuant to section 5.2 of the Bylaws.

The Chairman then proposed the appointment of Mr. E.T. Klassen as Postmaster General, presenting a suggested contract of employment in this connection, and Mr. Klassen excused himself from the meeting. A discussion ensued, after which, upon motion duly made, seconded, and unanimously carried, the remaining eight Governors then adopted Resolution 71-24, "Appointment and Compensation of Postmaster General," annexed hereto and incorporated herein.

Mr. Klassen then rejoined the meeting and indicated his acceptance of the appointment.

The Board accepted Mr. Nelson's resignation as Secretary, effective December 15, 1971. Mr. Hayden having rejoined the meeting, there was a general discussion of the roles of the Postmaster General and Deputy Postmaster General, following which the meeting was adjourned.

David A. Wilson
Secretary